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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

ELIZABETH H. DOLE, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
AND
CF&I STEEL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

KENNETH W. STARR
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

CLIFFORD M. SLOAN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FRIEDMAN
Associate Solicitor

CHARLES I. HADDEN
Deputy Associate Solicitor

MARK S. FLYNN
Attorney
Department of Labor
Washington, D.C. 20210

QUESTION PRESENTED

Whether the Secretary of Labor, rather than the Occupational Safety and Health Review Commission, is entitled to deference in the interpretation of a Department of Labor regulation if the Secretary's and the Commission's interpretations of the regulation conflict.

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CF&I STEEL CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-11a) is reported at 891 F.2d 1495. The decision of the Occupational Safety and Health Review Commission (App., *infra*, 14a-54a) is reported at 12 O.S.H. (BNA) 2067 and 1986-1987 O.S.H. Dec. (CCH) ¶ 27,691. The decision of the administrative law judge (App., *infra*, 55a-91a) is unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 12a-13a) was entered on December 22, 1989. On March 14, 1990, Justice White extended the time for filing a petition for writ of cer-

tiorari to April 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent sections of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651(b)(3), 655, 658, 659, 660 (1982 & Supp. V 1987), and 661) are reprinted at App., *infra*, 92a-110a. Department of Labor regulations 29 C.F.R. 1910.134 and 1910.1029(g) are also reprinted at App., *infra*, 111a-123a.

STATEMENT

1. In 1970, Congress enacted the Occupational Safety and Health Act (OSH Act), Pub. L. No. 91-596, 84 Stat. 1590 (29 U.S.C. 651 *et seq.*), "to assure so far as possible * * * safe and healthful working conditions" for "every working man and woman in the Nation." 29 U.S.C. 651(b). Toward that end, the OSH Act provides the Secretary of Labor with a broad array of regulatory and enforcement responsibilities. Specifically, she has authority to "promulgate, modify, or revoke any occupational safety or health standard" (29 U.S.C. 655(b)); to grant variances from such standards to particular employers (29 U.S.C. 655(d)); and to conduct investigations and worksite inspections to assure compliance with health and safety requirements (29 U.S.C. 657). The OSH Act also empowers her to issue citations to employers whenever she believes that an employer has violated the OSH Act or any standard, rule, regulation, or order promulgated by the Secretary (29 U.S.C. 658); to propose civil penalties against cited employers (29 U.S.C. 659(a), 666); to prescribe abatement periods for cited health and safety violations (29 U.S.C. 658(a), 659(c)); and to seek injunctive relief in federal court from imminent dangers to employee safety and health. 29 U.S.C. 662(a). See generally *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. 3, 3-4 (1985); *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 8-9 (1980); *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 445-446 (1977).[1]

[1] The Secretary has delegated many of her OSH Act responsibilities to the Assistant Secretary for Occupational Safety and Health, who heads the Occupational Safety and Health Administration (OSHA), an agency within the Department of Labor that is responsible for enforcing the OSH Act. See generally Secretary of Labor's Order No. 12-71, 36 Fed. Reg. 8754 (1971); Order No. 8-76, 41 Fed. Reg. 25,059 (1976); Order No. 9-83, 48 Fed. Reg. 35,736 (1983).

In the OSH Act, Congress also created the Occupational Safety and Health Review Commission (OSHRC) "for carrying out adjudicatory functions." 29 U.S.C. 651(b)(3). An employer may contest the Secretary's citation or notice of penalty before the Commission; in addition, an employee or employees' representative may challenge the time for abatement in the Secretary's citation. 29 U.S.C. 659(c). When a citation, penalty, or abatement date is contested, the Commission must "afford an opportunity for a hearing * * * [and] thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty." 29 U.S.C. 659(c); *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. at 446. The OSH Act vests the Commission with power to compel attendance of witnesses, production of documents, and taking of evidence. 29 U.S.C. 661(h) and (i).

The OSH Act limits the Commission's rulemaking authority to establishment of procedural norms for adjudicatory hearings before the Commission and its administrative law judges. 29 U.S.C. 661(g). The Commission has no jurisdiction over petitions to review the Secretary's promulgation of a safety or health standard; rather, the statute provides the courts of appeals with authority to review challenges to standards. 29 U.S.C. 655(f). If the Commission affirms a citation, only the Secretary may seek enforcement of the administrative order in the court of appeals. 29 U.S.C. 660(b). The Secretary or an aggrieved party may seek judicial review of adverse Commission decisions. *Ibid.* All civil penalties assessed in final Commission decisions are payable to the Secretary and are recoverable only in a civil action brought by the Secretary in federal district court. 29 U.S.C. 663, 666(*l*); *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. at 447.

2. In 1976, the Secretary determined that coke oven emissions are carcinogenic. Pursuant to her rulemaking authority

under the Act, she promulgated a standard governing occupational exposure to coke oven emissions. 41 Fed. Reg. 46,742-46,790 (1976); 29 C.F.R. 1910.1029. The standard requires limiting employee exposure to a specified level of coke oven emissions in a "regulated area" (29 C.F.R. 1910.1029(c)). The standard also requires the use of engineering and work practice controls to achieve that reduction (29 C.F.R. 1910.1029(f)). Of particular relevance for purposes of this case, the standard permits the use of respirators as a method of compliance in certain circumstances – for example, when controls are not yet sufficient to reduce exposure to the permissible limit (29 C.F.R. 1910.1029(g)(1)). The coke oven regulation includes requirements concerning provision of respirators in such circumstances (29 C.F.R. 1910.1029(g)), and one of these requirements incorporates into the coke oven regulation a general regulation regarding respirators. See 29 C.F.R. 1910.1029(g)(3) ("The employer shall institute a respiratory program in accordance with § 1910.134 of this part.").

3. In August 1979, the Secretary conducted an inspection at respondent's coke oven facility in Pueblo, Colorado.[2] The Secretary and respondent had previously reached a settlement regarding citations issued to respondent for violations of the coke oven emissions standard. App., *infra*, 19a. As a result of the August 1979 inspection, the Secretary issued three additional citations. *Id.* at 90a-91a. One part of one citation is currently at issue. *Id.* at 3a, 36a-37a.

The inspection disclosed that respondent had conducted two kinds of respirator tests with its employees. App., *infra*, 79a. The first was a "positive/negative pressure test," in which a worker places the respirator on his face, inhales or exhales, and checks for leakage along the respirator seal; it is not conducted in a "test atmosphere." *Id.* at 3a, 59a. The second was a "banana oil" test, in which a worker, while wearing a respirator, is put in

[2] References in this petition to respondent are to respondent CF&I Steel Corporation, which briefed and argued the case in the court of appeals. OSHRC was nominally a respondent in the court of appeals (pursuant to Fed. R. App. P. 15), but did not participate in those proceedings.

a "test atmosphere" and exposed to isoamyl acetate ("banana oil") in order to determine whether he can detect the odor of the chemical despite the respirator. *Id.* at 3a, 38a, 59a. The Secretary discovered that 28 of respondent's employees had detected banana oil, but that respondent had failed to give them different respirators. Instead, respondent had simply sent the employees, with the same respirators, into a "regulated area." *Id.* at 3a, 38a-39a, 78a. Some of these employees were exposed to coke oven emission levels exceeding the permissible exposure limit. *Id.* at 81a-82a. Relying on the fact that "28 coke oven employees working in the regulated area exposed to coke oven emissions failed their respirator fit test and were not provided with a different respirator which would fit" (*id.* at 37a), the Secretary issued a citation for a "willful" violation of 29 C.F.R. 1910.1029(g)(3) – the coke oven provision that incorporates the respirator regulation in 29 C.F.R. 1910.134. The Secretary assessed the maximum penalty of $10,000.[3]

4. Respondent contested the citation. A Commission administrative law judge (ALJ) held five days of hearings in February 1980, and issued an opinion upholding the citation in August 1981. The ALJ found that, as the Secretary charged, 28 employees detected banana oil in the banana oil test and were then sent into the coke oven areas without any adjustment in their respirators. App., *infra*, 79a-82a.

The Secretary maintained that Section 1910.1029(g)(3) of the coke oven emissions standard, by incorporation of the respiratory protection program requirement in 29 C.F.R. 1910.134(e) – and 1910.134(e)(5) in particular[4] – requires employers both to assure that each employee's respirator fits properly by using a test atmosphere (as in the banana oil test) and to provide a different type or size respirator if an employee's equipment fails the test. App., *infra*, 39a, 78a-79a.

[3] A "willful" violation is the most serious form of civil violation, and the highest civil penalties are authorized for such violations; violations may also be characterized as "serious" and "not serious." 29 U.S.C. 666.

[4] 29 C.F.R. 1910.134(e)(5) provides, in part, that "[t]raining shall provide the men an opportunity to handle the respirator, have it fitted properly, * * * and, finally, to wear it in a test atmosphere."

Respondent defended on the ground that the standard did not require testing in a test atmosphere at all, and that the positive/negative tests fully satisfied the standard. *Id.* at 78a-79a.

The ALJ agreed with the Secretary. He concluded that the pertinent regulation—29 C.F.R. 1910.134(e)(5)—requires qualitative fit testing in a test atmosphere and that it imposed a requirement that a respirator fit properly. App., *infra*, 79a. "Since these test results show that the employees were not properly fitted, [respondent] was obligated to provide a different respirator to those that failed the test." *Id.* at 80a. The ALJ concluded that the violation was willful and observed that respondent's "cynical disregard for the safety of its workers and • • • deliberate disregard for the standard itself make[] even the maximum penalty seem pitifully inadequate." *Id.* at 82a.

5. Five years later, in September 1986, the Commission reversed the ALJ's judgment. The Commission concluded that Section 1910.1029(g)(3)—the coke oven provision incorporating the respirator standard—is a "training standard" and "does not require the employer to assure proper fit of an employee's respirator." App., *infra*, 40a. The Commission emphasized that the next paragraph of the coke oven regulation—Section 1910.1029(g)(4)—explicitly requires that respirators fit properly; thus, in the Commission's view, Section 1910.1029(g)(3) could not, without redundancy, be read to require proper respirator fit as well. App., *infra*, 40a, 41a. The Commission also concluded that, on its own terms, the general respirator standard of Section 1910.134 does not impose a requirement that an employer assure respirator fit; the Commission stressed that Section 1910.134 refers to instruction and training and should be interpreted as a training program. App., *infra*, 40a. Thus, the Commission interpreted Section 1910.134(e)(5) as "requiring the employer to instruct employees during training in such things as how to select a respirator, how to put on a respirator, how to achieve a proper fit and how to obtain a face-piece seal" (App., *infra*, 41a), and as requiring the employer to give an employee the opportunity to wear the respirator in a test atmosphere during training. *Ibid.* The Commission concluded, however, that it does not require the employer to insure that proper fit is achieved. *Ibid.*

Inasmuch as respondent's employees had received instruction and an opportunity to wear respirators in a test atmosphere, the Commission concluded that the requirements of Section 1910.134 had been met. App., *infra*, 45a. According to the Commission, "[t]he fact that some employees detected the banana oil while in the test atmosphere does not establish by itself that the instructions or training otherwise provided were inadequate." *Ibid.* Accordingly, the Commission vacated the citation. One Commissioner dissented.[5]

6. The Secretary petitioned for review. On December 22, 1989, the court of appeals denied the petition and upheld the Commission's determination. The court noted that an agency's interpretation of a statute is entitled to deference and must be accepted if reasonable, and that such deference is particularly appropriate where an agency "interprets its own administrative regulations." App., *infra*, 4a. The court then observed that, although the Secretary had interpreted 29 C.F.R. 1910.1029(g)(3) as a testing standard for proper fit, the Commission had interpreted it as a training standard. "The question therefore arises: When the Secretary and Commission disagree over the interpretation of an OSHA regulation, which view prevails, *i.e.*, to whom is deference owed?" App., *infra*, 4a. Observing that the question is "an issue upon which the federal circuits are split" (*ibid.*), the court concluded that, "in the face of conflicting regulatory interpretations, deference is properly accorded to the interpretation of the Commission." *Id.* at 2a.[6]

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[5] The dissenting Commissioner reasoned that, regardless of whether Section 1910.134 is a "training standard or a use standard," the Secretary had established a violation. App., *infra*, 51a. He maintained that, even if the standard is construed as a training provision, the 28 employees who used respirators that did not fit "were not trained to comprehend the proper fit of respirators, or to use the respirators properly." *Id.* at 52a. He also agreed that the violation was appropriately characterized as "willful." Emphasizing that 28 employees failed the banana oil test, he noted that the conduct "demonstrates, at the very least, plain indifference to employee safety." *Id.* at 54a.

[6] The panel distinguished the Tenth Circuit's earlier decision in *Brennan* v. *OSHRC & Kesler*, 513 F.2d 553, 554 (1975), in which the court of appeals had appeared to endorse the contrary rule and pay deference to the interpretation of the Secretary. Because, in the panel's view, the Commission's interpretation

Since in the court's view the statutory language did not settle the matter, the court consulted the legislative history. It noted that Congress had decided against combining prosecutorial and adjudicative authority in the Secretary, and had created the Commission as an "autonomous, independent, and quasi-judicial body." App., *infra*, 6a. The court emphasized that the "adjudicative function necessarily encompasses the power to 'declare' the law." *Id.* at 7a. Thus, the court concluded that "where the Secretary has failed to convey the meaning of an OSHA regulation to those charged with construing it, and where the Commission has given the regulation an interpretation well within the plain meaning of the terms of the regulation, we will defer to the interpretation of the Commission." *Ibid.*

The court of appeals took note of *Potomac Electric Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) (Pepco), in which this Court concluded that the interpretations of the Benefits Review Board under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, were not entitled to deference because the Board has only adjudicative, and not policymaking, authority. The court of appeals viewed this Court's statement as "dicta" (App., *infra*, 8a) and, for two reasons, distinguishable. First, Longshore adjudications are nonaccusatory, "whereas OSHA requires accusatory proceedings that may result in substantial penalties." *Ibid.* Second, Longshore claims are brought by private citizens, not by the government. *Ibid.* The court concluded that the Longshore context does not "implicate" Congress's concerns about vesting prosecutorial and adjucative functions in a single governmental entity, and that the "need for a strict separation of prosecutorial and adjudicative functions is therefore far more acute in the case of OSHA." *Ibid.*

The court of appeals also stated that its decision did not give "carte blanche" to the Commission; it observed that "[t]he

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in that case was not supported by the regulatory language, the panel did not believe that *Kesler* established a rule applicable to this case. App., *infra*, 5a.

Secretary's unique policy and rulemaking role requires that her regulatory interpretations be accorded substantial weight by the Commission and contravened only if clearly wrong or in the presence of genuine ambiguity." App., *infra*, 9a. However, if there is "genuine ambiguity," the court held, the reasonable interpretation of the Commission will control. *Ibid.* The court also noted that, if the Secretary maintains that a different result should prevail, she may amend or clarify the regulations through rulemaking. *Id.* at 7a, 11a.

Turning to the merits of the specific interpretive question at issue, the court ruled that the Commission did not unreasonably interpret 29 C.F.R. 1910.1029(g)(3) to be a training standard rather than a testing standard to ensure continuing proper fit. App., *infra*, 9a-11a. The court found support for its position in 29 C.F.R. 1910.134(e)(5)'s reference to "training." At the same time, the court noted that "it is certainly possible to reach an alternate interpretation of the ambiguous regulatory language." App., *infra*, 11a. Nonetheless, applying its rule that it would defer 'to a reasonable Commission interpretation, the court upheld the Commission's decision.

REASONS FOR GRANTING THE PETITION

This Court should review the court of appeals' holding that it would defer to the Commission's interpretation of an OSH Act standard that the Secretary had promulgated rather than to the Secretary's interpretation. As the court of appeals' opinion recognizes, the circuits are in widespread conflict on the question. Furthermore, in concluding that a purely adjudicatory body (the Commission) rather than the policymaking and enforcement authority (the Secretary) is entitled to deference, the court of appeals misapplied the principles underlying this Court's decisions on deference. Finally, the question is of considerable importance. As this case illustrates, the court of appeals' rule frustrates the Secretary's exercise of the policymaking and enforcement duties entrusted to her by Congress.

1. The courts of appeals are severely divided on the question of which entity—the Secretary or the Commission—is entitled

to deference under the OSH Act. The First, Fifth, Seventh, and Eleventh Circuits have endorsed a rule favoring the Secretary's interpretation. *Donovan* v. *A. Amorello & Sons, Inc.*, 761 F.2d 61, 64-66 (1st Cir. 1985); *Brock* v. *Chicago Zoological Soc'y*, 820 F.2d 909, 912 (7th Cir. 1987); *United Steelworkers* v. *Schuylkill Metals Corp.*, 828 F.2d 314, 319-320 (5th Cir. 1987); *Brock* v. *Williams Enterprises of Georgia, Inc.*, 832 F.2d 567, 569-570 (11th Cir. 1987). Cf. *Brock* v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537 & n.2 (D.C. Cir. 1986) (noting split under OSH Act, and holding that, under the Federal Mine Safety and Health Act, deference is accorded to the Secretary rather than to the Federal Mine Safety and Health Review Commission). In contrast, in addition to the Tenth Circuit in this case, the Second, Fourth, Sixth, and Ninth Circuits defer to the Commission. *Marshall* v. *Western Elec., Inc.*, 565 F.2d 240, 244 (2d Cir. 1977); *Brennan* v. *Gilles & Cotting, Inc.*, 504 F.2d 1255, 1261-1262 (4th Cir. 1974); *Usery* v. *Hermitage Concrete Pipe Co.*, 584 F.2d 127, 132 (6th Cir. 1978); *Brock* v. *Bechtel Power Corp.*, 803 F.2d 999, 1000-1001 (9th Cir. 1986).[7]

This division of authority undermines important values of uniformity. Moreover, as this case illustrates, a deference rule is often outcome determinative, since the rule establishes which of two reasonable, but conflicting, interpretations the court will approve. See App., *infra*, 11a ("While it is certainly possible to reach an alternate interpretation of the ambiguous regulatory

[7] The court of appeals cited the Eighth Circuit as one of the Circuits favoring deference to the Commission. App., *infra*, 5a (citing *Brennan* v. *OSHRC*, 513 F.2d 713, 715-716 (1975)). The Eighth Circuit's most recent decision, however, suggests that deference to the Commission is not appropriate. See *Brock* v. *Dun-Par Engineered Form Co.*, 843 F.2d 1135, 1137 (1988).

The Third Circuit has not articulated a clear deference rule governing cases in which there is a conflict between the Secretary's and the Commission's interpretations. Compare *Bethlehem Steel Corp.* v. *OSHRC*, 573 F.2d 157, 160 (1978) (suggesting that deference is inapplicable when Commission's and Secretary's interpretations conflict), with *Director, OWCP* v. *Mangifest*, 826 F.2d 1318, 1323 n.11 (3d Cir. 1987) (explaining *Bethlehem Steel* on the ground that the Secretary had failed to clarify an ambiguous regulation interpreted in conflicting ways by the Commission). See also *Donovan* v. *Adams Steel Erectors, Inc.*, 766 F.2d 804, 807 n.3 (3d Cir. 1985).

language * * *, we defer to the interpretation chosen by the Commission."); *United Steelworkers* v. *Schuylkill Metals*, 828 F.2d at 320 ("In this case, the standard of review determines the outcome."); *Brennan* v. *Gilles & Cotting*, 504 F.2d at 1262 (statute allows decision "either way" on question of whether a general contractor is jointly responsible with subcontractor for safety violations hazardous to subcontractor workmen, and court defers to interpretation of Commission). In addition, the existence of conflicting rules on this issue provides a strong incentive for forum shopping by the party seeking review of a Commission decision. See 29 U.S.C. 660(a) (1982 & Supp. V 1987) (aggrieved party may obtain review of Commission order in the circuit in which violation occurred, where the employer has its principal place of business, or in the District of Columbia Circuit). Thus, there is a substantial conflict in the circuits, and a need for this Court to establish the governing rule.[8]

2. The decision below is incorrect. The court of appeals' fundamental error is its failure to recognize that the Secretary is entitled to deference because she is charged by Congress with policymaking and rulemaking; the Commission is simply an adjudicatory agency. Judicial deference is rooted in a proper respect for the "legislative delegation to an agency" of policymaking responsibility. *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 844 (1984). Thus, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" (*ibid.*), and the dispositive question is whether the agency's "choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute" (*id.* at 845) (internal quotation marks omitted). Deference is appropriate because an

[8] The court of appeals' suggestion that deference to the Commission is appropriate only when there is ambiguity in a regulation (App., *infra*, 7a, 9a) does not minimize the reach of its decision because deference is generally relevant only when there is ambiguity in the language of a regulation (or statute). See also *Lukman* v. *Director, OWCP*, No. 88-1733 (10th Cir. Feb. 22, 1990), slip op. 5 n.3 (noting that, "[i]n *Dole*, we joined those Circuits which defer to the Commission").

agency's interpretations are part of the policymaking responsibility that has been delegated to the agency.[9]

As this Court has observed, "[i]t is the Secretary, not the Commission, who sets the substantive standards for the workplace," and "enforcement of the Act is the sole responsibility of the Secretary." *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. at 6-7. In contrast, the Commission's function "is to act as a neutral arbiter and determine whether the Secretary's citation should be enforced over employee or union objections." *Id.* at 7. A necessary component of Congress's grant to the Secretary of broad and exclusive authority to define, investigate, and prosecute health and safety violations, see p. 2, *supra*, is the authority to provide guidance for both OSHA compliance officers and affected employers and employees by developing reasonable interpretations of the standards and regulations issued under her rulemaking authority. Cf. *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. at 7 (Commission may not review Secretary's decision to issue or withdraw a citation because the Secretary's authority to make such decisions is a "necessary adjunct" of her power to set substantive standards and issue citations).

In light of Congress's explicit grant of authority to the Secretary, not to the Commission, to promulgate standards for employee safety and health, it is clear that the Secretary's interpretation of her own regulations should receive deference. The Commission does not write, or participate in any way, in the formulation of health and safety standards. Cf. *Mullins Coal*

[9] "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). See also *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980). An administrative interpretation of a regulation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Udall* v. *Tallman*, 380 U.S. at 16-17. The particular deference due an agency's interpretation of its regulation rests on the fact that the interpretation has been provided by "the agency responsible for promulgating and administering the regulation." *Immigration & Naturalization Service* v. *Stanisic*, 395 U.S. 62, 72 (1969).

Co. v. *Director, OWCP*, 484 U.S. 135, 159 (1987) ("[T]he Secretary's view is not only eminently reasonable but also is strongly supported by the fact that Labor wrote the regulation."). The Commission is vested "with no direct policymaking functions" (*Donovan* v. *OSHRC*, 713 F.2d 918, 930 (2d Cir. 1983)), and "[u]nlike the NLRB and the FTC, it has neither prosecution nor enforcement powers," *Dale M. Madden Constr., Inc.* v. *Hodgson*, 502 F.2d 278, 280 (9th Cir. 1974). The Commission, as an institution with a solely adjudicatory function, is not well situated to develop broad expertise in administering an occupational safety and health program, or in appreciating "the likely practical outcomes" of different interpretations of particular safety and health standards. *Donovan* v. *A. Amorello & Sons, Inc.*, 761 F.2d at 66. Because OSHRC reviews only *contested* enforcement actions that the Secretary initiates—a tiny proportion of OSHA's overall activities [10]—the Commission's vision of the program is, of necessity, quite narrow. The Secretary, in contrast, has gained a much wider and sharper perspective in the course of developing new and revised standards, of monitoring workplaces across the country for compliance, and of making investigatory and prosecutorial decisions on the broad range of health and safety issues that arise under the Act itself and the standards she has promulgated.

Notwithstanding the Secretary's pivotal role, the court of appeals concluded that deference to the Commission was appropriate to protect the Commission's role under the Act. App., *infra*, 6a-7a. The court emphasized that since the Commission's adjudicative function encompasses a "power to 'declare' the law," deference to the Secretary's interpretation of her regulations, rather than to the Commission's interpretation of them, would undermine that power. *Id.* at 7a.

The court's analysis is off the mark. As an initial matter, even an agency entitled to deference on judicial review does not conclusively " 'declare' the law"; only the reviewing court may prop-

[10] In fiscal year 1988, less than two percent of the Secretary's citations were contested; 174,396 violations were cited during that time. Current Report, 18 O. S. H. Rep. 1668 (BNA) (Mar. 1, 1989).

erly exercise that function. See *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. at 568 (noting the "ultimate judicial responsibility to determine the law"). And the court of appeals' statement is incorrect even as to the more limited point that an adjudicatory agency must receive deference in its exposition of the governing standard. The Commission's pronouncement about the meaning of the Secretary's regulations are not based on the exercise by the Commission of any regulatory function; as a result, those pronouncements do not qualify for deference under *Chevron* and its progeny. Moreover, deference to the Secretary's reasonable interpretation of her regulations – by the Commission as well as by courts – is not inconsistent with an adjudicatory function.[11] When an adjudicatory body defers to a reasonable administrative interpretation of a regulation or statute, it is not denigrating its adjudicatory authority; it is, rather, exercising that authority in accordance with established principles. *Chevron*, 467 U.S. at 842-845.

The court of appeals also relied on the OSH Act's legislative history, and in particular on the congressional determination to separate the adjudicatory function from the enforcement function. App., *infra*, 6a-7a. This is a slender reed. The legislative history reveals that Congress forged a compromise between bills creating different administrative schemes: one approach would have lodged enforcement authority in the Secretary, but placed rulemaking as well as adjudication authority in separate boards independent of the Secretary; the other approach would have placed all three functions in the Secretary. In the end, Congress provided the Secretary with authority to regulate and enforce, and created the Commission to adjudicate contested citations.[12]

[11] Indeed, at the same time that the court of appeals stressed the importance of the interpretive role to the Commission's adjudicatory function (App., *infra*, 7a), the court also emphasized that the Commission should defer to the Secretary's interpretation and reject it only if "clearly wrong or in the presence of genuine ambiguity." *Id.* at 9a.

[12] During consideration of the bill that ultimately became the OSH Act, labor and management advocates were at odds about whether the Secretary of Labor, in addition to his prosecutorial role, should have power to promulgate safety and health standards and adjudicate contested enforcement cases. The Administration bill, supported by business interests, proposed creation of

For purposes of the issue presented here, the critical point is that Congress entrusted exclusive policymaking authority to the Secretary; indeed, Congress explicitly rejected the proposal to take that authority away from the Secretary.[13]

Thus, the legislative history does not suggest that Congress intended the Commission to have broad interpretive powers. Like the statute itself, this history indicates instead that the principal purpose of creating the Commission was to ensure fair and even-handed treatment of individual employers who have been

separate rulemaking and adjudication boards, both independent of the Secretary, while the Senate and House committee bills, supported by organized labor, combined all three functions in the Secretary. See S. Rep. No. 1282, 91st Cong., 2d Sess. 8, 15 (1970), and H.R. Rep. No. 1291, 91st Cong., 2d Sess. 17-20, 24 (1970), *reprinted in* Staff of the Senate Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970* at 148, 155, 847-850, 854 (Comm. Print 1971) [hereinafter *Legislative History*]. Senator Javits unsuccessfully proposed in committee a compromise whereby the Secretary would regulate and enforce, and an independent three-person panel would adjudicate (S. Rep. No. 1282, *supra*, at 55 *reprinted in Legislative History* 194), but he was later successful in obtaining its adoption on the Senate floor (*Legislative History* 381-393, 462-479). The creation of an independent adjudicatory panel was included in the House-passed bill (*id.* at 1098-1101), and was adopted by the conference committee (*id.* 1147, 1165-1169).

[13] The OSH Act requires the President to appoint Commissioners "who by reason of training, education, or experience are qualified to carry out the functions of the Commission." 29 U.S.C. 661(a). Some courts have considered this provision an indication that Congress intended to make OSHRC an expert body, and have concluded that courts should therefore defer to its expertise. See, *e.g.*, *Dunlop* v. *Rockwell International*, 540 F.2d 1283, 1289-1290 (6th Cir. 1976). But the provision is not an endorsement of any policy role for the Commission; rather, it reflects congressional concern that the Commissioners have some background in safety and health to assist them in carrying out their adjudicative function. Indeed, the fact that the OSH Act does not require Commission involvement in the formulation of standards or in the resolution of the vast majority of violations confirms OSHRC's lack of a policy role. Thus, there is no Commission review of the Secretary's interpretation of the OSH Act and regulations for the more than 98% of violations that employers do not contest. See 29 U.S.C. 659(a) and note 10, *supra*. Moreover, the OSH Act permits affected persons to challenge the validity of standards that the Secretary promulgates directly in the court of appeals, without *any* review by the Commission. 29 U.S.C. 655(f).

cited for violations.[14] This goal is in no way undermined by requiring deference to the Secretary's interpretations of regulations (or of the statute).

The conclusion that in this context the policymaking entity rather than the adjudicatory entity should receive deference is also supported by principles established in analogous contexts. Referring to the Benefits Review Board and its adjudicatory role under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, this Court stated that "the Benefits Review Board is not a policymaking agency; its interpretation of the LHWCA thus is not entitled to any special deference from the courts." *Potomac Elec. Power Co.* v. *Director, OWCP*, 449 U.S. 268, 278 n.18 (1980) *(Pepco)*.[15] Despite the court of

[14] See, *e.g.*, *Legislative History* 464 (Sen. Javits) ("The enforcement of orders is an adjudicatory act, whereas the establishment of standards is a deliberative act. There are serious penalties involved for the individual enterprise. It is a case by case proposition. It does not apply across the board to every member of industry."); *id.* at 1147 (Sen. Williams) (separation of prosecutorial and adjudicative roles intended "to provide every assurance that fairness and due process would be fairly served"). Critics of the combination of all functions in the Labor Department had objected that management would perceive the Secretary, "traditionally * * * the voice of labor in the administration" (*id.* at 473 (Rep. Anderson)) as unfair to businesses that were cited for violations (*ibid.* (Sen. Holland)), and that the combination would create "an undue concentration of power" with a potential for abuse (*id.* at 426 (Sen. Dominick).

[15] The longshore and harbor workers' compensation program (33 U.S.C. 901 *et seq.*) is similar to the OSH Act in that one entity (the Secretary of Labor) is given policymaking and program functions (33 U.S.C. 939 (1982 & Supp. V 1987)), and another entity (the Benefits Review Board) is given adjudicatory authority (33 U.S.C. 921(b)). The Secretary has delegated her authority to the Director, Office of Workers' Compensation. 20 C.F.R. 701.201, 701.202. Deputy Commissioners subordinate to the Secretary (and thus the Director) make initial determinations on benefits claims (33 U.S.C. 919 (1982 & Supp. V 1987)), and their decisions may be appealed to the Benefits Review Board (33 U.S.C. 921(b)). Unlike OSHRC, the Benefit Review Board's members are appointed by the Secretary of Labor; its decisions nevertheless constitute final agency action from which judicial review may be sought by the Director and other aggrieved parties. 33 U.S.C. 921(c). The Black Lung Benefits Act of 1972 (30 U.S.C. 901 *et seq.*) incorporates this structure. See 30 U.S.C. 932(a) (1982 & Supp. V 1987) (incorporating by reference certain administrative provisions of the Longshore Act). Following

appeals' asserted distinctions (App., *infra*, 7a-8a), this principle is fully applicable to the OSH Act context because in both instances Congress assigned policymaking responsibilities to the Secretary. Neither the fact that the Secretary (rather than a private citizen) brings OSH Act enforcement actions nor the fact that in the OSH Act Congress separated that prosecutorial function from the adjudicatory function undercuts this basic identity. Similarly, under the Federal Mine Safety and Health Act of 1977 (the MSH Act) (30 U.S.C. 801 *et seq.*), the Secretary of Labor, rather than the Mine Health and Safety Review Commission, receives deference in the interpretation of the Secretary's regulations. See *Brock* v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d at 537 n.2 (Scalia, J.) ("We see no reason to depart from the view we announced with regard to the Mine Act * * * which leaves interpretive discretion where it normally resides, with the policy-maker rather than the adjudicator.").[16]

Pepco, the courts of appeals have concluded that, because "the BRB's function is more akin to that of a District Court, unlike other agencies' policymaking bodies," due deference should be accorded to the views of the Director, and not the Board, in cases of conflict over statutory or regulatory interpretation between the Director and the Board. *Alford* v. *American Bridge Div., U.S. Steel Corp.*, 642 F.2d 807, 809 & n.2 (5th Cir. 1981), cert. denied, 455 U.S. 927 (1982). See also *Lukman* v. *Director, OWCP*, slip op. 5; *Saginaw Mining Co.* v. *Mazzulli*, 818 F.2d 1278, 1283 (6th Cir. 1987); *Peabody Coal Co.* v. *Blankenship*, 773 F.2d 173, 175 (7th Cir. 1985); *Bethlehem Mines Corp.* v. *Director, OWCP*, 766 F.2d 128, 130 (3d Cir. 1985). Cf. *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 163-164 (1987) (Court adopts Secretary's reasonable interpretation of black lung regulation that she has promulgated, but also notes Board's agreement with Secretary); *Morrison-Knudsen Const. Co.* v. *Director, OWCP*, 461 U.S. 624, 635 (1983) (shared "practice" of Board and the Director is entitled to deference). But see *Director, OWCP* v. *Detroit Harbor Terminals, Inc.*, 850 F.2d 283, 288 (6th Cir. 1988) (neither Board nor Director is entitled to deference).

[16] The Federal Mine Safety and Health Act of 1977 established a structure for the mine safety and health program similar to the occupational safety and health program. The Secretary of Labor is entrusted with rulemaking, investigative, and prosecutorial authority (30 U.S.C. 811, 813-816 (1982 & Supp. V 1987)), and the Federal Mine Safety and Health Review Commission has adjudicative powers (30 U.S.C. 815, 823). The legislative history of the MSH Act (which was passed seven years after the OSH Act) confirms that the Secretary

Under the OSH Act, as in these other contexts, the policymaker should receive deference in the interpretation of the policymaker's regulations.

3. The issue presented in this case is of considerable importance. As we have noted, a court's deference rule is often outcome determinative, and thus a rule favoring deference to the Commission treads heavily on the policymaking and regulatory role Congress sought to lodge in the Secretary. Cf. *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. at 7 ("a procedure [that] would * * * allow the Commission to make both prosecutorial decisions and to serve as the adjudicator of the dispute * * * [would be] a commingling of roles that Congress did not intend"). Moreover, the many decisions in the courts of appeals on this issue (pp. 9-10, *supra*) reveal how frequently the issue recurs. Although the court of appeals in this case suggested that the Secretary can amend the regulation, the amending process is burdensome and time-consuming, and if the Secretary's interpretation of a regulation is reasonable, that process should not be necessary.[17] Furthermore, the court's requirement bars enforcement of the Secretary's interpretation in the interim. In this case, for instance, the court of appeals' holding would enable respondent to escape liability even though, under the Secretary's reasonable interpretation of her own regulations, the employer willfully violated the coke oven emissions standard by requiring its workers to use inadequate respirators in areas with dangerously high emission levels.

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of Labor should receive deference as an aspect of her policymaking and administrative responsibilities: "Since the Secretary of Labor is charged with responsibility for implementing the Act, it is the intention of the Committee, consistent with generally accepted precedent, that the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977). See also 1 C.F.R. 305.86-4 (recommendation of Administrative Conference of the United States that legislation adopting a split-enforcement model of agency adjudication explicitly provide that the adjudicatory agency should defer to the rule-making agency's interpretations).

[17] To the extent that the same deference rule applies to statutory interpretations, the Secretary cannot correct a Commission interpretation simply by amending a regulation.

In view of the division in the courts of appeals on a question of such importance, the issue warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

DAVID L. SHAPIRO
Deputy Solicitor General

CLIFFORD M. SLOAN
Assistant to the Solicitor General

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

CHARLES I. HADDEN
Deputy Associate Solicitor

MARK S. FLYNN
Attorney
Department of Labor

APRIL 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 86-2641

ELIZABETH H. DOLE, SECRETARY OF LABOR, PETITIONER

vs.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, RESPONDENT

CF&I STEEL CORPORATION, INTERVENOR-RESPONDENT

[FILED Dec. 22, 1989]

ON PETITION FOR REVIEW OF AN ORDER OF THE OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION (OSHRC No. 79-4786)

Before: MOORE and BALDOCK, Circuit Judges and DAUGHERTY, District Judge.*

BALDOCK, Circuit Judge.

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* The Honorable Frederick A. Daugherty, Senior United States District Judge for the Western District of Oklahoma, sitting by designation.

The Secretary of Labor (Secretary) appeals from a decision of the Occupational Safety and Health Review Commission (Commission) vacating a citation charging CF&I Steel Corporation (CF&I) with willfully violating 29 C.F.R. § 1910.1029(g)(3). That regulation governs employee exposure to coke oven emissions. The Secretary argues that CF&I violated the Occupational Safety and Health Act (OSHA) by failing to utilize atmospheric testing, as envisioned by OSHA regulations, to insure that respirators worn by its employees fit properly. The Secretary further contends that her interpretation of OSHA regulations is entitled to deference. In contrast, CF&I favors the Commission's interpretation of OSHA regulations, which holds that atmospheric testing is not required to insure respirator fit, and contends that the Commission's interpretation is entitled to deference.

Our jurisdiction arises under 29 U.S.C. § 660(b). We hold that, in the face of conflicting regulatory interpretations, deference is properly accorded to the interpretation of the Commission. Finding the Commission's interpretation of coke oven respiratory regulations to be reasonable, we affirm.

I.

CF&I operated a steel plant near Pueblo, Colorado. As part of its steel-making operation, the company produced coke, a coal derivative, to fuel its blast furnaces. Coke production creates carcinogenic vapors which are dangerous to workers' health. Acting pursuant to OSHA, the Secretary promulgated regulations setting the maximum allowable emissions for coke ovens and mandating the use of respirators whenever that level was exceeded. *See generally* 29 C.F.R. § 1910.1029. These regulations were upheld following a challenge by CF&I and other coke producers. *See American Iron & Steel Inst. v. OSHA*, 577

F.2d 825 (3d Cir. 1978), *cert. dismissed*, 448 U.S. 917 (1980).

In order to perform their protective function, respirators must be fitted properly on each employee. Although there are several ways to test a respirator for proper fit, two methods are relevant to this case: 1) positive/negative pressure testing whereby the employee places the respirator on his face, inhales or exhales, and checks for any leakage of air along the seal; and, 2) atmospheric testing in which the employee wears a respirator in a room filled with noxious vapors, commonly known as "banana oil" vapors, and tries to detect the odor.

CF&I conducted a training program in respirator usage for its coke oven employees. A training film was produced and shown instructing employees how to perform the positive/negative pressure test. CF&I also conducted atmospheric testing for its employees, twenty-eight of whom detected the odor of banana oil. CF&I allowed these twenty-eight employees to return to work with the same respirator.

The Secretary cited CF&I for failing to equip the twenty-eight employees who detected banana oil with respirators that fit. The ALJ affirmed the citation and, finding CF&I a willful violator, fined the corporation $10,000. On appeal, the Commission reversed the ALJ, holding that 29 C.F.R. § 1910.1029(g)(3) only enunciates a training standard for respirator usage, not a testing standard for respirator fit.

II.

A.

Normally, an administrative agency's interpretation of a statute is entitled to considerable deference and should be disturbed only if unreasonable. *See Chapman v. Department of Health & Human Serv.*, 821 F.2d 523, 527 (10th

Cir. 1987). Such deference is particularly appropriate where an agency interprets its own administrative regulations. *See Edwards v. Califano*, 619 F.2d 865, 868 (10th Cir. 1980). Even when two equally reasonable interpretations are present, the reviewing court must defer to the interpretive choice of the administrative agency. *Brennan v. OSHRC & Kesler*, 513 F.2d 553, 554 (10th Cir. 1975) (*Kesler*).

In the instant case, the Secretary and Commission disagree over the proper interpretation of 29 C.F.R. § 1910.1029(g)(3). The Secretary contends that the regulation requires atmospheric testing to assure that each employee is properly fitted with a respirator while the Commission interprets the regulation as requiring atmospheric testing only in the course of training employees on the proper application of respirators. The question therefore arises: When the Secretary and Commission disagree over the interpretation of an OSHA regulation, which view prevails, *i.e.*, to whom is deference owed?

Whether judicial deference under OSHA is accorded to the regulatory interpretations of the Secretary or the Commission is an issue upon which the federal circuits are split. The First, Fifth, and Seventh Circuits defer to the Secretary. *See United Steelworkers of Am. v. Schuylkill Metals Corp.*, 828 F.2d 314, 319-20 (5th Cir. 1987); *Brock v. Chicago Zoological Soc'y*, 820 F.2d 909, 912 (7th Cir. 1987); *Donovan v. A. Amorello & Sons*, 761 F.2d 61, 64-66 (1st Cir. 1985). *See also Brock v. Cathedral Bluffs Oil Co.*, 796 F.2d 533, 537, 537 n.2 (D.C. Cir. 1986) (deferring to Secretary over Federal Mine Safety and Health Review Commission in case brought under Federal Coal Mine Safety and Health Act). In contrast, the Second, Fourth, Sixth, Eighth and Ninth Circuits defer to the Commission. *See Brock v. Bechtel Power Corp.*, 803 F.2d 999, 1000-01 (9th Cir. 1986); *Usery v. Hermitage Concrete*

Pipe Co., 584 F.2d 127, 132 (6th Cir. 1978); *Marshall v. Western Electric*, 565 F.2d 240, 244 (2d Cir. 1977); *Brennan v. OSHRC*, 513 F.2d 713, 715-16 (8th Cir. 1975); *Brennan v. Gilles & Cotting, Inc.*, 504 F.2d 1255, 1261-62 (4th Cir. 1974).

The Secretary cites our decision in *Kesler*, 513 F.2d at 553, for the proposition that this circuit defers to the Secretary's regulatory interpretation over that of the Commission. In *Kesler*, we were faced with a dispute between the Secretary and Commission over the effective date of an abatement order under OSHA and concluded that the Secretary's regulatory interpretation was proper. *Id.* at 558. However, contrary to the arguments advanced by the Secretary in the instant case, this court in *Kesler* did not reach its conclusion merely by adopting the Secretary's reasonable interpretation; we considered the respective views of the Secretary and Commission and found the Commission's interpretation unsupported by the regulatory language. The *result* of *Kesler* should not be mistaken as an endorsement of an approach which always defers to the Secretary over the Commission. For in the subsequent case of *Marshall v. Cities Serv. Oil Co.*, 577 F.2d 126, 131 (10th Cir. 1978), we adopted the legal conclusions of the Commission over those proposed by the Secretary. Thus, the question of whether, in the face of conflicting regulatory interpretations, deference properly is accorded to the Secretary or Commission has not been addressed in the circuit.

B.

Statutory authorization for the Occupational Safety and Health Review Commission is provided in 29 U.S.C. § 661. Composed of persons specially qualified "by reason of training, education, or experience," 29 U.S.C. § 661(a), the Commission serves in an adjudicative capacity when-

ever an employer elects to challenge a citation issued by the Secretary. 29 U.S.C. § 659(c). However, as evidenced by the split within the federal circuits, whether the Commission or Secretary is empowered with final interpretive authority over OSHA regulations remains unclear from the statutory language. We therefore consult the legislative history behind the Commission as a "secondary source" to help us determine the Commission's statutory powers vis-a-vis the Secretary. *See Miller v. Commissioner*, 836 F.2d 1274, 1282-84 (10th Cir. 1988) (reliance on legislative history is more justifiable where statute is unclear and legislative history is consulted with specific question in mind). Because the legislative history concerning the Commission's enactment is relatively uniform and clear, such history provides a reliable indicator of Congressional intent and should be accorded weight by this court. *See id.* at 1282.

When first proposed, the Occupational Safety and Health Act vested the power to adjudicate alleged safety violations with the Secretary. *See* S. 2193, 91st Cong., 1st Sess. § 6 (1969), *reprinted in* Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 11-13 (1971) (*Legislative History*). However, in response to business concerns that combining prosecutorial and adjudicative authority in the Secretary would produce decisions biased against employers, Congress created the Commission by adopting a floor amendment which withdrew adjudicative authority from the Secretary. *See id.* at 463-64. Congress envisioned the Commission as an autonomous, independent and quasi-judicial body. *Id.* at 462, 465. Subsequent judicial interpretation has emphasized that the prosecutorial power vested in the Secretary remains separate and distinct from the adjudicative power vested in the Commission. *See, e.g., Cuyahoga Valley Ry.*

v. United Transp. Union, 474 U.S. 3, 7 (1985) (per curiam) (Commission's review of Secretary's decision to dismiss citation constituted an improper encroachment upon the Secretary's prosecutorial prerogative).

Congress sought to endow the Commission with the normal complement of adjudicative powers possessed by traditional administrative agencies. *Legislative History* at 462, 465; *Gilles & Cotting*, 504 F.2d at 1262. Such an adjudicative function necessarily encompasses the power to "declare" the law. *Id.* at 1261-62. Accordingly, where the Secretary has failed to convey the meaning of an OSHA regulation to those charged with construing it, and where the Commission has given the regulation an interpretation well within the plain meaning of the terms of the regulation, we will defer to the interpretation of the Commission. *See Brennan v. OSHRC*, 513 F.2d at 715-16. If the Secretary believes that the Commission has interpreted a regulation in a manner inconsistent with OSHA's goals, it may be necessary to amend or clarify that regulation. *See id.* at 716.

Two circuits rely upon a footnote in *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 278 n.18 (1980), for the proposition that the Commission's interpretations are not entitled to deference because the Commission is only charged with adjudication. *Schuylkill*, 828 F.2d at 319; *Chicago Zoological*, 820 F.2d at 912. *Potomac Electric* involved an injured worker's claim for benefits under the Longshoremen's and Harbor Workers' Compensation Act. 33 U.S.C. § 901-950. The ALJ and the Benefits Review Board departed from the settled construction of the Act and determined that the injured claimant was entitled to an ongoing recovery. *Potomac Electric* 449 U.S. at 272. The Supreme Court held that the Board's interpretation contravened the plain language of the Act, its legislative history and all prior decisional authority and

consequently reversed the D.C. Circuit's decision upholding the Board's interpretation. *Id.* at 279-80. Included in footnote 18 of the Court's opinion was the following dicta: "It should also be noted that the Benefits Review Board is not a policymaking agency; its interpretation of the LHWCA thus is not entitled to any special deference from the courts." *Id.* at 278 n.18.

This language makes specific reference to the Benefits Review Board created under the Longshoremen's Compensation Act; it would be presumptuous for us to extend the Supreme Court's language outside the context in which it arose. Moreover, the structural, historical and theoretical differences between the Review Board and the Commission further distinguishes this case from *Potomac Electric*. The Longshoremen's Compensation Act mandates nonaccusatory adjudication of injured workers' claims whereas OSHA requires accusatory proceedings that may result in substantial penalties. While the Commission resulted from Congressional concern that the prosecutorial and adjudicative functions not be vested in one governmental entity, no such concerns are implicated by the Longshoremen's Compensation Act where the prosecutorial function is carried out by a private citizen. The need for a strict separation of prosecutorial and adjudicative functions is therefore far more acute in the case of OSHA than under the Longshoremen's Compensation Act. *Compare Potomac Electric*, 449 U.S. at 278 n.18 (no deference to adjudicative agency in action brought by claimant under Longshoremen's Compensation Act) *with Cuyahoga Valley*, 474 U.S. at 7 (Secretary's prosecutorial function under OSHA must remain separate and distinct from Commission's adjudicative role). *See generally* Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 Colum. L. Rev. 759, 803 (1981).

Although we hold that, under OSHA, deference is properly accorded to the regulatory interpretations of the Commission, we recognize that another result may prevail under a different statutory framework. We further stress that our holding not be construed as a carte blanche for the Commission to overturn settled regulatory interpretations of the Secretary. The Secretary's unique policy and rulemaking role requires that her regulatory interpretations be accorded substantial weight by the Commission and contravened only if clearly wrong or in the presence of genuine ambiguity. Because we find the regulations in the instant case to be ambiguous, we defer to the interpretation enunciated by the Commission, insofar as it is reasonable.

III.

Employee exposure to coke oven emissions is governed by 29 C.F.R. § 1910.1029. Generally, compliance with permissible exposure limits may not be achieved by the use of respirators except in limited cases where abatement is not technologically feasible. 29 C.F.R. § 1910.1029(g)(1). Where respirators are necessary, however, the employer shall select, provide and assure the use of the appropriate respirator based upon the airborne concentration of coke oven emissions. *Id.* With respect to training and testing of respirators, OSHA regulations provide in pertinent part:

> (3) *Respirator program.* The employer shall institute a respiratory protection program in accordance with § 1910.134 of this part.
>
> (4) *Respirator usage.* (i) The employer shall assure that the respirator issued to the employee exhibits minimum facepiece leakage and that the respirator is fitted properly.

29 C.F.R. § 1910.1029(g)(3), (4). The incorporated § 1910.134, entitled "Respiratory Protection," contains

general regulations governing respirator use in all industries and includes a discussion of atmospheric testing:

> For the safe use of any respirator, it is essential that the user be properly *instructed* in its selection, use, and maintenance. Both supervisors and workers shall be so *instructed* by competent persons. *Training* shall provide the men an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere.

29 C.F.R. § 1910.134(e)(5) (emphasis supplied). The Secretary argues that the incorporation of § 1910.134 into § 1910.1029(g)(3) mandates atmospheric testing to insure the proper fit of each employee's respirator. Conversely, the Commission held that § 1910.134(e)(5) is merely a training standard only applicable when teaching employees how to apply their respirators, not a testing standard to insure proper fit.

Safety legislation is to be liberally construed to effectuate the congressional purpose of improving health and safety in the workplace. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 13 (1980). Moreover, OSHA regulations provide that general standards supplement specific ones by filling those gaps remaining after the promulgation of specific standards. *Texas E. Prod. Pipeline Co. v. OSHRC*, 827 F.2d 46, 49 (7th Cir. 1987); 29 C.F.R. § 1910.5(c). Nevertheless, it cannot be said that the Commission's interpretation of § 1910.1029(g)(3) in this case was unreasonable. The plain wording of the incorporated § 1910.134(e)(5) prescribes that atmospheric testing is mandated in the "training" of employees. The Commission therefore concluded reasonably that CF&I was not required to utilize ongoing atmospheric testing to insure the proper fit of

each employee's respirator. While it is certainly possible to reach an alternate interpretation of the ambiguous regulatory language contained in 29 C.F.R. §1910.1029, we defer to the interpretation chosen by the Commission. If the Secretary maintains that a different result should prevail under OSHA, she should amend or clarify these regulations through the rulemaking process.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 86-2641
(OSHRC No. 79-4786)

ELIZABETH H. DOLE, SECRETARY OF LABOR, PETITIONER

v.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, RESPONDENT

CF&I STEEL CORPORATION, INTERVENOR RESPONDENT

JUDGMENT
Entered December 22, 1989

Before: MOORE and BALDOCK, Circuit Judges and DAUGHERTY, District Judge.*

BALDOCK, Circuit Judge.

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* The Honorable Frederick A. Daugherty, Senior United States District Judge for the Western District of Oklahoma, sitting by designation.

This cause came on to be heard upon petition for review of an order of the Occupational Safety and Health Review Commission. The matter was heard on the administrative record of the Occupational Safety and Health Review Commission and was argued by counsel.

Upon consideration whereof, it is ordered that the order of the Occupational Safety and Health Review Commission is affirmed. Accordingly, the petition for review is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

APPENDIX C

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION
1825 K STREET, N.W.
4th FLOOR
WASHINGTON, D.C. 20006

OSHRC Docket No. 79-4786

SECRETARY OF LABOR, COMPLAINANT

v.

CF&I STEEL CORPORATION, RESPONDENT

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
LOCAL 2102, AUTHORIZED EMPLOYEE REPRESENTATIVE

DECISION

BEFORE: BUCKLEY, Chairman; RADER and WALL, Commissioners.

BY THE COMMISSION:

This case is before the Occupational Safety and Health Review Commission under 29 U.S.C. § 661(j), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). The Commission is an adjudicatory agency, independent of the Department of Labor and the Occupational Safety and Health Administration ("OSHA"). It was established to resolve disputes arising out of enforcement actions brought by the Secretary of Labor under the Act and has no regulatory functions. *See* section 10(c) of the Act, 29 U.S.C. § 659(c).

CF&I Steel Corporation ("CF&I") operates a steel plant near Pueblo, Colorado. At this plant, CF&I also operated a coke oven facility to produce coke for use in its steelmaking. Following an inspection of its coke oven facility, several citations were issued to CF&I that alleged violations of the coke oven emissions standard. CF&I contested these citations and the case was assigned to former Administrative Law Judge Quentin P. McColgin, Jr. After a hearing on the merits, the judge affirmed some citations and affirmed some in part. CF&I and the authorized employee representative, the United Steelworkers of America, AFL-CIO, Local 2102 ("the Union") obtained review of the judge's decision.[1]

---

[1] CF&I ceased operations at this coke plant on or about December 31, 1982. While this case was pending on review, we granted the Secretary's motion to withdraw a citation in another case involving this employer. *CF&I Steel Corp.*, OSHRC Docket No. 81-454. Our order in that case was based in part on the Secretary's assertion that he was "informed by counsel for [CF&I] and the authorized employee representative that [CF&I] has permanently ceased operation of its coke oven facility in [Pueblo, Colorado.]" In a notice filed with all parties in this case, we requested information on: (1) whether the coke ovens involved here had ceased operations; (2) whether the abatement requirements of these citations were moot; and (3) what issues, if any, remained in dispute. By joint stipulation of the parties, we were informed that the coke oven facility cited in the case has ceased operation and that CF&I had "no intention" of resuming operations in the "forseeable future." The parties also stipulated the abatement requirements of the citations were moot but that "[t]he citations upon review, themselves, and the corresponding penalties are the only issues subject to continuing dispute."

Background

1. *CF&I's Coking Operation*

CF&I produced coke in three adjoining batteries: Battery B, containing 65 ovens, was located at the south end of the configuration; Battery C, containing 47 ovens, was in the middle; and, Battery D, containing 31 ovens, was on the north end. Each oven contained in the batteries was approximately 2 feet wide, 20 feet high and 120 feet long. Pinion walls, made of masonry, were located at the ends of each battery. These pinion walls extended vertically from ground level and served as structural supports for the series of ovens contained within each battery. The pinion walls ranged in width from three to six feet thick. Intermediate pinion walls were located between batteries B and C and between C and D. The outer pinion walls were at the ends of batteries B and D. There were coal bins or bunkers adjacent to and beyond the outer pinion walls on the north and south ends of the batteries. Door repair shops were also located beyond the outer walls, below the coal bins on what is known as the "bench level" of the battery.

The coking cycle begins with the introduction of coal into the coke oven. This procedure, called charging, is carried out by a larry car which operates on rails that run the length of the top or "topside" of the battery. The larry car receives coal from one of the coal bins or bunkers located south of the outer pinion wall on Battery B and north of the pinion wall on Battery D. The larry car then moves along topside to the oven to be charged, the lids on the tops of ovens are removed, and the coal is dropped into the oven.

After the lids are replaced, the coal is heated for 16 to 20 hours at approximately 1100° C (2000° F). When the coal is coked, it is then ready to be pushed from the oven. Doors on both sides of the oven, the "push side" and the "coke

side," are removed. A "pusher machine" then travels along tracks on the "push side" of the battery and uses a mechanical ram to push the coke into the quench car, located on the tracks on the "coke side" of the oven.

The coke is then removed from the battery area, cooled, and transferred to the coke wharf. It then is stored for use in steelmaking. After the push, the oven doors on both sides of the battery are inspected to determine whether their emission-limiting seals have been damaged during the coking. Damaged doors are returned to one of the door repair shops located below the coal bunkers at bench level.

2. *OSHA's Coke Oven Emissions Standard*

The coke oven emissions standard was adopted by OSHA after extensive rulemaking proceedings. It was published on October 22, 1976, and became effective on January 20, 1977. 41 Fed. Reg. 46,742-90 (1976). The standard that finally was adopted was published with an extensive preamble. The preamble explained the standard, discussed how it differed from the standard originally proposed, and summarized the comments received during the notice-and-comment rulemaking proceedings.

The final standard requires employers to establish engineering controls and work practices to reduce employees' exposure to coke oven emissions to 150 micrograms per cubic meter (150 ug/m^3) averaged over any eight-hour period. This 150 ug/m^3 permissible exposure limit (PEL) may not be exceeded in specific "regulated areas" on and near the battery. Although other standards regulating toxic and hazardous substances in Subpart Z of 29 C.F.R. Part 1910 use the term "regulated area," the coke oven emissions standard is unique in its definition of the term. It identifies specific work areas on the coke oven battery as regulated areas. In contrast, other standards in Subpart Z define a "regulated area" as one where the substance being

regulated is "manufactured, processed, used, repackaged, released, handled or stored," *e.g.*, 29 C.F.R. §§ 1910.1003-1910.1016, or where employee exposure to the substance in question exceeds the PEL for that substance. *E.g.*, 29 C.F.R. §§ 1910.1018, 1910.1044, 1910.1045, 1910.1047. This decision not to define a "regulated area" on the basis of ambient coke oven emission levels was deliberate.[2]

The coke oven emissions standard also provides that if the prescribed engineering and work controls do not reduce emission levels in the regulated area to the PEL, employers must supply employees with respirators. The preamble to the coke oven emission standard states that the fit of respirators is to be tested qualitatively and quantitatively. 41 Fed. Reg. 46,773-74. Respirator fit testing was discussed extensively by the parties in this case. The record shows that a qualitative fit test is subjective in that leakage is detected by the wearer of the respirator. A quantitative fit test is more precise in that leakage is measured by an instrument that compares the contaminant level inside and outside the respirator face piece. The preamble confuses these tests and describes qualitative testing as quantitative testing. 41 Fed. Reg. 46,774.

[2] The final standard's treatment of regulated areas differs significantly from the approach of the standard originally proposed by the Secretary. 40 Fed. Reg. 32,268-77 (1975). The originally proposed regulated area provision did not mention the battery ends or the screening station. The preamble does not explain why "battery ends" was added to the final standard. It does state generally that all areas specified as "regulated areas" in the final standard were associated with increased health risk. 41 Fed. Reg. 46,756 (1976). In addition to designating specific work areas as regulated areas, the proposed standard also provided that a regulated area be established in "any other coke plant work area where the permissible exposure limit is exceeded." The preamble to the final standard stated that this approach to designating regulated areas was deleted because "[a]ny area where the permissible exposure limit could be exceeded, would, by definition already be a part of the [regulated area]. 41 Fed. Reg. 46,757. It is quite clear therefore that under the final standard, regulated areas must be designated in specific work areas and *not* by reference to whether the PEL is exceeded.

The validity of the coke oven emissions standard was challenged in the United States Court of Appeals for the Third Circuit by several members of the coke-producing industry, including CF&I. The Third Circuit generally upheld the validity of the standard; however, the provision of the standard that required annual "quantitative testing" of respirators, which bears on our resolution of one citation here, was invalidated by the court. *American Iron and Steel Institute v. OSHA*, 577 F.2d 825, 838-9 (3d Cir. 1978) ("*AISI*"). OSHA subsequently amended the standard to delete the quantitative fit test requirement. 50 Fed. Reg. 37,352-54 (1985).

3. *Enforcement of the standard at CF&I's plant*

During review of the standard, the Third Circuit lifted a temporary stay of enforcement of the standard. During May and July of 1977, OSHA inspected CF&I's coking operation. As a result of the inspection, CF&I was cited for several violations of the coke oven emissions standard. The parties entered into a settlement agreement that resolved all disputed issues. This settlement was approved by the Commission and became a final order on June 14, 1979.

On August 1, 1979, after the abatement date agreed upon in the settlement had passed, OSHA conducted a follow-up inspection to determine if the previously cited conditions had been abated. As a result of the follow-up inspection, OSHA issued the citations now before us.

Citation 1: 29 C.F.R. § 1910.1029(d)(2)(i), "Battery Ends"

The citation alleges that CF&I violated section 1910.1029(d)(2)(i) by failing to establish certain areas and machinery of the coke plant as "regulated areas." These were the topside north and south coal bin areas, the bench level north and south door repair facility, and nos. 1-3 push cars and larry cars. Section 1910.1029(d)(2)(i) provides:

> (d) *Regulated areas.*
>
> * * *
>
> (2) The employer shall establish the following as regulated areas:
>
> (i) The coke oven battery including topside and its machinery, pushside and its machinery, coke side and its machinery, *and the battery ends*; the wharf; and the screening station;

(Emphasis added.)

There is no dispute that CF&I did not establish the north and south coal bin areas and the north and south door repair facilities as regulated areas. As already noted, these cited areas were beyond the outermost pinion walls. There also is no dispute that the larry cars and push cars were not designed as regulated areas when located beyond the pinion walls. The parties do dispute, however, whether the cited work areas and machinery are part of the "battery ends" and, thus, part of the regulated area. As we have already noted, if an area or machinery is designated as a "regulated area," employees in the area may not be exposed to coke oven emissions in excess of the 150 ug/m[3] PEL, and the employer must take other protective measures, including medical surveillance and provision of protective equipment.[3]

[3] The standard required employers to provide quarterly monitoring of the exposure levels of employees in the regulated area, § 1910.1029(d)(i) and (iii), and monthly medical surveillance for these

1. *Facts*

Compliance officer Gerald Ryan conducted the initial inspection as well as the follow-up inspection that resulted in the present citations. Based on conversations with CF&I's management and his review of CF&I's records, Ryan determined that CF&I "no longer" considered the cited areas to be regulated areas. It appears that when the initial inspection was conducted, the cited areas were designated as regulated areas by CF&I. Compliance officer Ryan thought that CF&I had misinterpreted OSHA's "respirator break" policy, described in OSHA Instruction STD 1-4.3, and that as a result, it had deregulated areas on the battery where emissions sampling showed that the PEL was not exceeded.[4] These deregulated areas were described

employees, § 1910.1029(j)(1)(i). Employees who work in the area must wash their hands and face before eating, and shower at the end of their shift. Section 1910.1029(i)(2)(i) & (i)(4)(i). These employees also must be trained regarding the hazards of emissions and the protective measures required by the standard. Section 1910.1029(k)(1)(i). Smoking and drinking are prohibited in the regulated areas. Section 1910.1029(i)(5)(i).

[4] Instruction STD 1-4.3 was issued on April 19, 1979, approximately three months before this inspection. 1978-79 CCH Developments Binder ¶ 11,678. Its purpose was to "clarify the compliance procedures for determining an effective respirator program for the coke oven emissions standard." This instruction states in part:

> 1. At this time any employee in the regulated area must wear a respirator except in the lunch rooms or in filtered air locations and except as provided below.
>
> a. Employees in the regulated area need not wear a respirator in clearly delineated areas that have been shown by air sampling to be consistently below the permissible exposure level (PEL) of 150 ug/m[3] (8 hour TWA). Such locations may include large areas, such as the push side bench or small areas, such as the bench level between batteries.

The instruction also states that due to the discomfort and inconvenience associated with wearing a respirator, wearers could remove res-

by CF&I as "respirator break areas." In Ryan's view, respirator break areas were still part of the regulated area.

John Winkley, CF&I's Manager of Air and Water Quality Control, and James Oliver, assistant superintendent of the Coke Plant, testified that the steelmaking industry considered the "battery end" to be the pinion wall. Winkley stated: "[t]o my knowledge, the ends of the batteries are defined by the location of the pinion walls at the end of the series of [coke] ovens." His definition was based on his engineering experience and conversations "with other coke plant operating personnel." According to Oliver, "[t]he end of the battery is customarily defined as being . . . the pinion walls, the extremity of the pinion wall." Oliver's definition was apparently based on observation of numerous batteries.

Winkley and Oliver also testified that the coal bin and the door repair facility were not included in the regulated area because they were "beyond the ends of the battery." According to assistant superintendent Oliver, these areas were also designated as "respirator break areas" because sampling in these areas showed that emissions were "consistently" below the PEL. CF&I required employees in the cited "respirator break areas" to wear protective clothing. Respirators were to be worn only in the presence of visible emissions. The consumption of food and drinks was prohibited in these areas but smoking was allowed.

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pirators for a "brief rest period" or for "essential work conversations" in areas that were not below the PEL so long as the respirator was worn for a sufficient period to reduce exposure below the PEL. Finally, the instruction states the following regarding "battery ends":

> Battery ends include, but are not limited to, the coal loading area between batteries on topside and bench level (and not just pinion wall to pinion wall). In general, all parts of the battery above ground level are within the regulated area.

The parties did not focus very closely on whether CF&I was required to designate the cited push cars and larry cars as regulated areas. The compliance officer testified that this machinery should have been designated as regulated areas when located beyond the pinion walls because it was contaminated with coke oven emissions when present on the battery. Assistant superintendent Oliver stated that when the cited cars were not in use or were being repaired, they were beyond the pinion walls and therefore not considered part of the regulated area. He stated that when these cars were within the battery walls they were considered part of the regulated area.

2. *The judge's decision*

The judge concluded that CF&I had violated the standard by failing to designate the cited locations and machinery as regulated areas. Although the judge found that "[t]he battery end is considered throughout the industry to be the pinion wall," he concluded that the Secretary did not use the term in the sense understood by industry and therefore that facilities and machinery located beyond the pinion walls must be considered part of the regulated area.

Based on an aerial photo of the coke plant, the judge reasoned that "anyone, except possibly a member of the coke oven industry" would consider CF&I's series of coke batteries as a "single structure." Because of the proximity of the cited areas to the coke ovens, he concluded that these areas should be considered part of the "battery ends" and therefore a regulated area.

Citing the preamble to the standard, the judge further found that "[i]t [was] the express intention of the promulgators of the standard to include within the regulated areas, all work areas wherein the permissible exposure limit to coke oven emissions could be exceeded." Although

he found no evidence of sampling results taken at the door repair facilities and coal bins, the judge did find that samples taken in the immediate vicinity of these areas approached or exceeded the PEL. *See* note 5, *infra*. He concluded that the PEL "could" have been exceeded in these locales and, thus, that they should have been designated as regulated areas. He also found that a statement in the preamble—that "[t]he larry car receives a load of coal from the coal bunker at the end of the battery"—provided "[m]ajor support" for concluding that, in using the term "battery ends," OSHA intended to include facilities beyond the pinion walls, such as coal bunkers, as part of the regulated area.

The judge rejected CF&I's argument that the larry cars and push cars should not be considered part of the regulated areas when positioned beyond the pinion walls. According to the judge, this machinery could be contaminated by coke oven emissions even when moved beyond the pinion walls. Without explanation, he concluded that there was "need for some, but not necessarily all, the protective requirements that come into play by designating the machines as regulated areas."

3. *The parties' arguments*

CF&I argues that the judge's broad interpretation of the term "battery ends" is contrary to the industry's definition of the term and violates the rule of construction that the words of a regulation should be given their "commonly understood" meaning. In this regard, CF&I points out that the judge explicitly found that "[t]he battery end is considered throughout the industry to be the pinion wall."

According to CF&I, the other reasons advanced by the judge for broadly interpreting the term "battery ends" are unfounded. CF&I first argues that the judge's finding that the battery "looks" like a single structure represents a lay-

man's view of the structure that disregards industry's view. It next contends that, contrary to the judge's findings, the preamble does not provide support for a broad interpretation of the term "battery ends." CF&I concedes that the preamble does state that "coal bunkers" are located at the "end of the battery" but argues that this statement was taken out of context by the judge and that it merely reflected a very general statement used in discussing the coking process and not a definition of the term "battery end."

CF&I next contends that section 1910.1029(d)(2) specifically enumerates the areas that must be regulated under the standard. It asserts that the judge misread the standard by finding that a regulated area exists wherever the PEL could be exceeded. CF&I asserts that this approach to designating a regulated area was not followed in the final standard and cites the language from the preamble in support. In any event, CF&I contends that the record contains sampling results from both door repair facilities and that these results were both below the PEL.

The union argues that the pinion walls are not the "battery ends." It asserts that "if the Secretary had intended the regulated area to be defined by the pinion wall[,] that is what the regulation would have said since that is the term used by the industry." In the union's view, "battery ends" refers to the area and structures attached to the pinion walls that contain the cited coal bins and door repair areas. The union points out that the pinion walls are three to six feet thick and that they are not work areas.

Relying on the preamble, the union further asserts that OSHA excluded areas on and near the battery from the regulated area coverage only where there was no epidemiological evidence of excess health risk. It contends that the preamble and standard require that certain job classifications must be monitored quarterly because they are associated with excess health risks. Since certain of the employees

in these positions – such as coke oven patchers, repairmen, and maintenance personnel – work on the batteries as well as in cited areas beyond the pinion walls, it submits the cited areas should also be considered part of the regulated area. The union also argues that evidence showing that the PEL could be exceeded in the disputed areas demonstrates the need for establishing these areas as regulated.

Finally, the union contends that even if the Commission narrowly construes "battery ends" as pinion walls and concludes that the door repair facilities and coal bunkers were not regulated areas, the citation must be affirmed as to the cited larry cars and push cars because the standard requires "topside and its machinery [and] pushside and its machinery" to be established as regulated areas without reference to the "battery ends."

Although the Secretary concedes that the term "battery ends" has no plain meaning and is undefined by the standard, he submits that language contained in the preamble to the coke oven standard demonstrates that it was OSHA's "clear intention" to include facilities and machinery located beyond the pinion wall within the regulated area. Like the union, the Secretary contends that the preamble's statement that "[t]he larry car receives a load of coal from the coal bunker *at the end of the battery*" (emphasis supplied by the Secretary) demonstrates the intent to include areas such as the coal bunkers within the regulated areas. He further asserts the preamble and the standard's definition of regulated area show that OSHA intended to include large areas on and near the battery in the regulated area and not a three-to-six-foot wide wall. According to the Secretary, a broad interpretation of battery ends also is appropriate because CF&I's sampling results show that coke oven emissions "can and do exceed the [PEL] in areas beyond the pinion walls." He points out

that CF&I recognized that the disputed areas and machinery were part of the regulated area because, prior to the issuance of OSHA Instruction Std. 1-4.3 (*see* note 4, *supra*) and when the initial inspection of its facility was conducted, CF&I had designated these areas as regulated areas. Finally the Secretary argues that his construction of the standard should be controlling because it is reasonable.

4. *Discussion*

To determine whether CF&I violated the standard by failing to establish the door repair and coal bin areas as "regulated areas," we must determine whether they were part of the "battery ends." In construing the standard, we are mindful of several principles. We must look first to the language of the standard. *See Bunge Corp.*, 86 OSAHRC ____/____, 12 BNA OSHC 1785, 1789, 1986 CCH OSHD ¶ 27,565, p. 35,804 (No. 77-1622, 1986), and cases cited. Second, although legislative history and other extrinsic aids to interpretation may be used to determine the intent of the drafter, standards should be construed in a way that does not deprive employers of fair notice of the requirements of the law. *See id.*, 12 BNA OSHC at 1790-91, 1986 CCH OSHD at p. 35,806, and cases cited. *See also Usery v. Kennecott Copper Corp.*, 577 F.2d 1113, 1119 (10th Cir. 1977); *Bethlehem Steel Corp. v. OSHRC*, 573 F.2d 157, 161-162 (3d Cir. 1978); *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 650 (5th Cir. 1976); *Lisbon Contractors, Inc.*, 84 OSAHRC 19/A2, 11 BNA OSHC 1971, 1973-74, 1984 CCH OSHD ¶ 26,924, p. 34,500 (No. 80-97, 1984). We find that the language of the standard and its legislative history shed no light on the question before us, and that the construction of the standard for which the Secretary argues would deprive employers of the fair notice of their obligations that due process of law re-

quires. We therefore construe the term in the manner that this record shows it is understood by the coke oven industry.

The standard does not define the term "battery ends." Moreover, as the Secretary observes, the term has no plain meaning. Yet, the judge found, and neither the Secretary nor the union disputes, that "[t]he 'battery end' is considered throughout the industry to be the pinion wall." The judge and the parties have, however, looked to other sources as interpretive aids.

A.

Relying on the preamble to the standard, the union and the Secretary argue, and the judge found, that OSHA intended to establish regulated areas wherever the PEL for coke oven emissions was exceeded. Because of the proximity of the cited areas to the coke ovens and because CF&I's monitoring data purportedly showed that the PEL "could be exceeded" in the cited areas, the judge determined that the cited areas should be considered regulated areas.

This argument is directly contrary to the legislative history of the standard. The portion of the preamble relied on by the Secretary, the union, and the judge states:

> Both the proposed standard and the Advisory Committee report also established "any coke plant area where the [PEL] is exceeded as an RA [regulated area] (Ex. 1a, p. 322278; 3, p. 15). *The final standard does not follow that approach.* The permissible exposure limit of this standard only applies in the RA. (See discussion of Permissible Exposure Limit). Any area where the permissible exposure limit could be exceeded, would, by definition already be a part of the RA.

> Areas of the coke plant outside of the RA are covered by the existing CTPV standard. (See discussion of Scope and Application).

41 Fed. Reg. at 46,757 (emphasis supplied). As can be seen from this excerpt, regulated areas under the final standard were to be established by work areas and *not* by whether the PEL is or "could be" exceeded. Although the approach followed by the judge and urged by the Secretary and the union is consistent with the proposed standard and with other OSHA health standards, it is clearly inconsistent with the coke oven emissions standard as finally adopted. *See* note 2, *supra*. Finding the preamble very clear on this point, we must reject this basis for concluding that the cited areas are encompassed by the term "battery ends." [5]

We also do not find that the preamble's isolated statement that coal bunkers are "at the end of the battery," provides "[m]ajor support" for concluding that, in using the term "battery end," the Secretary intended to regulate facilities beyond the pinion walls. This statement is contained in a general description of a typical coking operation and clearly is not definitional. It is the only instance

[5] Based on this record, it is far from clear whether the PEL was consistently exceeded in the cited area. Relying on Exhibit C-22, the judge stated that no sampling results were produced for either the door repair or coal bin areas but that samples taken in the north and south lunchrooms "could" and did exceed the PEL. Contrary to what the judge found, there are sampling results in evidence for the north and south door repair areas. See Exhibit R-70. These results show that on four separate dates in the latter part of 1979, the door repair facilities were sampled. Of the 16 samples reported, none exceeded the 150 ug m³ PEL — the highest being 123 ug m³. These records also show that the north and south lunch rooms were sampled 24 times between April, 1979 and December, 1979. Although a sample taken at the south lunchroom was 280 ug m³, as found by the judge, the remaining 23 samples were below the 150 ug m³ PEL with 16 of this total below 50 ug m³.

of such usage in the 43-page, triple-columned preamble to this standard. We decline to wring an inference of intent from such an offhand and isolated statement.

OSHA Instruction STD 1-4.3, a policy directive on respirator programs for coke oven batteries, see note 4, *supra*, also fails on this record to convincingly show an intent by the drafters to encompass areas beyond outer pinion walls within the "battery ends." This directive discusses at length when "respirator break areas" may be established in a regulated area. In discussing that subject, it also states that:

> Battery ends include, but are not limited to, the coal loading area *between* batteries on topside and bench level (and not just pinion wall to pinion wall). In general, all parts of the battery above ground level are within the regulated area.

(Emphasis added.) This brief passage cannot be said on this record to be controlling. First, the record here contains no evidence that OSHA Instruction STD 1-4.3 reflects the intent of the drafters of the coke emissions standard. The instruction was issued over three years after the standard was published. Neither the instruction nor the record shows, and the Secretary's brief does not represent, that the drafters of the instruction were also the drafters of the standard or that they consulted with the standard's drafters. Like the respirator break-area policy it established (see note 4, *supra*), the instruction's discussion of the term "battery ends" was only a brief digression from the rest of the instruction, and could well have been only an afterthought by enforcement personnel. Second, the instruction does not address the situation posed by the facts of this case. Although the instruction states that battery ends include coal loading areas outside pinion walls, the battery ends being discussed are those *between* batteries, a

configuration that is far different than that existing at CF&I's plant. At best, this view would mean that coal loading areas between operating coke ovens would be regulated. It provides no support, however, for an argument that the term "battery ends" encompasses exterior coal loading areas beyond the outer pinion walls. Indeed, the very fact that the instruction stated that interior coal loading areas were within the battery ends, but did not say the same about exterior coal loading areas, would tend to indicate that the author of the instruction understood that the standard did not encompass exterior coal loading areas.

We also decline to ascribe significance to the interpretation of the standard proffered in the brief submitted by the Secretary. This standard is one of the few standards that was drafted by OSHA.[6] Inasmuch as the intent of OSHA in drafting the standard must be considered along with considerations of fair notice in construing the standard, we cannot ignore the construction placed on a standard by those in OSHA who drafted it. Such a construction would obviously have considerable probative value in determining the effect of the standard. However, the brief does not represent that it was written or reviewed by lawyers who consulted with the drafters of the standard or participated in the drafting of the standard. *See New England Telephone & Telegraph Co. v. Public Utilities Commission,*

[6] The vast majority of the standards adopted under the Act were drafted by private organizations rather than by OSHA. OSHA was required by section 6(a) of the Act to adopt privately-drafted standards without substantive change. See note 12 *infra* and accompanying text. Many of the standards that had been drafted by OSHA or the old Bureau of Labor Standards and adopted under section 6(a) of the Act as established federal standards were also derived largely from privately drafted standards. *See generally Dun Par Engineered Form Co.*, No. 79-2553 (July 30, 1986) (slip op. at 11, 14 & n 10, surveying the history and derivation of OSHA standards).

742 F.2d 1, 11 (1st Cir. 1984) (on rehearing) ("[The FCC's] 'views' here do not reflect agency policy reached after debate[] among staff or commissioners. Rather, as far as we can tell, they simply represent the General Counsel's interpretation of the statute; they are contained only in his brief."). *Cf. Investment Company Institute v. Camp,* 401 U.S. 617, 626-28 (1971)(counsel's efforts in litigation are "hardly tantamount to an administrative interpretation" of a statute).

Finally, we cannot agree with the judge's view that the cited areas are part of the battery ends because the coke oven facility – extending from the north door repair and coal bin area to the south door repair and coal bin areas – "looks like a single structure." Acknowledging that he was adopting the "single structure" interpretation advanced by the Secretary and the union, the judge found that "[a]nyone, except possibly a member of the coke oven industry . . . would likely view such facilities as one structure. . . ." As CF&I points out, however, the judge's interpretation is based on a layman's view of its facility. Neither the judge's observation as to the physical continuity of the facility nor his resultant interpretation of the term "battery" ends reflects industry's understanding or usage of this term, but instead employs an untutored observation to supplant the meaning of a term that is well-understood by individuals who are intimately familiar with coking operations and who, ultimately, are responsible for complying with the standard. Given the unrebutted evidence that industry considered the battery ends to be the pinion walls, we cannot adopt an interpretation that is based solely on the appearance of a coke oven to an untutored eye.

B.

We shall therefore apply the usual canons of construction here. Two well-settled rules of interpretation guide our decision. The first rule is that a word that is a term of art in a particular discipline should be construed accordingly where the statute or regulation being construed applies to the particular discipline. *Corning Glass Works v. Brennan,* 417 U.S. 188, 201, 94 S.Ct. 2223, 2231 (1974). *See United States v. Cuomo,* 525 F.2d 1285, 1291 (5th Cir. 1976), and cases cited therein. *See also* 2A C. Sands ed., *Sutherland on Statutory Construction* §§ 45.08 at 23, 47.7 at 137, 47.29 at 150 (1973). The second rule is that which we have noted above – that standards ought not be construed in a manner that deprives employers of fair notice of the requirements of the law.

The record here amply demonstrates that the only individuals who readily understood the term "battery ends" were coke producers. They considered the "battery ends" to be the pinion walls. The Secretary and the union argue that the coke producers' reading of these terms yields an incongruous result because employers would then be required to designate a three-to-six-foot wide wall as a regulated area. However, given the rather formidable evidence of industry's understanding of this term and OSHA's failure to inform employers that it intended this term to be applied in a different sense, it is inappropriate to construe "battery ends" in a sense that differs from industry's understanding of the term. As already stated, employers are entitled to fair notice of their responsibilities under the Act. Standards cannot be construed to mean what an agency intended but did not adequately express. *Diamond Roofing,* 528 F.2d at 649. "The test is not what [the Secretary] might possibly have intended but what he said." *Bethlehem Steel,* 573 F.2d at 161. As

Justice Frankfurter observed with regard to the interpretation of statutes:

> Even when it has spoken, it is as true of Congress as of others that what is said is what the listener hears.

Some Reflections on the Reading of Statutes, 47 Colum.L.Rev. 527 (1947). Here, the record shows that when OSHA said "battery ends," the employer heard "pinion walls" because its industry considers these terms synonymous and because OSHA gave the industry no notice in the standard that the term was not used in the sense it understood.

The Secretary asserts that CF&I heard and understood precisely what he claims OSHA intended by "battery ends" because the record also shows that the cited areas and equipment had at one time been designated as regulated areas. It appears that when CF&I was first inspected by OSHA in 1977, the cited areas and equipment were designated as regulated areas; however, following this inspection, CF&I departed from this policy. The assistant superintendent of the coke plant, Oliver, testified that some time after the standard was promulgated, on a date that he could not recall, a determination was made that the cited areas were not part of the regulated area. This evidence, it is submitted to us, demonstrates that the employer understood precisely what the standard required.

An employer who is actually aware of a standard's requirements may not claim that the standard fails to provide adequate notice of its requirements. *See Diebold, Inc. v. Marshall,* 585 F.2d 1327 (6th Cir. 1978). We do not, however, find that evidence that the cited areas were once designated as regulated areas is sufficient to overcome CF&I's and the coke oven industry's contrary interpretation in this case.

Accordingly we find that the standard does not require areas beyond the outermost pinion walls to be designated as regulated areas, and we reverse the judge's finding of a violation.

We next consider whether CF&I violated the standard by failing to designate the push cars and larry cars as designated areas. Neither the parties nor the judge focused closely on this aspect of the citation. The record shows that CF&I considered these cars part of the regulated areas when they were between the pinion walls. They were not designated as regulated areas when they were positioned beyond the pinion walls, in the vicinity of the door repair and coal bin areas. The judge found that CF&I violated the standard by failing to regulate these cars because they "could be expected to be contaminated with coke oven emissions even when they have been moved beyond the pinion walls . . . ." Without elaborating, he noted, "there is need for some, but not necessarily all, the protective requirements that come into play by designating the machines as regulated areas."

We reject the judge's adoption of an intermediate position – declaring that some but not all of the protections applicable to regulated areas shall apply when machinery is beyond the outer pinion walls. The Commission cannot construe this standard to require less or more than the protections imposed by its words without substituting its view of occupational health policy for that of the Secretary. *See generally Lisbon Contractors,* 11 BNA OSHC at 1973, 1984 CCH OSHD at p. 34,500. The question is instead controlled by the language of the standard and the standard's definition of "coke oven battery."

In describing the machinery that is to be included in the "regulated area," the standard refers to "[t]he coke oven battery including topside and its machinery, push side and its machinery, coke side and its machinery . . . ."

Although the standard thus refers to coke oven machinery such as the larry cars and push cars, it does so in connection with the topside, the pushside and the coke side. The standard does *not* state that the larry cars and push cars are themselves "regulated areas" when they are no longer in the coke oven battery—defined by section 1910.1029(b) as "a structure containing . . . slot-type coke ovens"—or the battery ends. We therefore find that the judge erred in concluding that the standard required this machinery to be regulated when positioned beyond the pinion walls.

Here the record shows that CF&I treated the machinery as part of the regulated area when it was positioned between the outer pinion walls on the three batteries operated at its facility, Batteries B, C, and D. This is all that the terms of the standard require. Accordingly, we vacate the portion of the citation alleging that CF&I violated this standard by failing to designate this machinery as regulated areas.

Citation 2: Sections 1910.1029(g)(3) and 1910.134(e)(5), Respiratory Program.

CF&I was also cited for a violation of 29 C.F.R. § 1910.1029(g)(3), which incorporates by reference 29 C.F.R. § 1910.134.[7] The citation alleges that:

[7] Section 1910.1029(g)(3) provides:

§ 1910.1029 *Coke oven emissions.*

* * *

(g) *Respiratory protection.*

* * *

(3) *Respiratory program.* The employer shall institute a respiratory protection program in accordance with § 1910.134 of this part.

* * *

The employer did not institute a respiratory protection program in accordance with 1910.134 of this part, in that: respirator training did not provide the men an opportunity to have their respirator fitted properly and test its face-piece-to-face seal:

a) 28 coke oven employees working in the regulated area exposed to coke oven emissions failed their respirator fit test and were not provided with a different respirator which would fit.

* * *

The specific provision of the respirator standard that allegedly was violated is section 1910.134(e)(5), which states:

§ 1910.134 *Respiratory protection.*

* * *

(e) *Use of respirators.*

* * *

(5) For safe use of any respirator, it is essential that the user be properly instructed in its selection, use, and maintenance. Both supervisors and workers shall be so instructed by competent persons. Training shall provide the men an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere.

Compliance officer Ryan testified that before they were assigned to the regulated areas, CF&I employees were given a respirator, told when to use it, and shown how to perform a positive-negative pressure test.[8] They were also

[8] Section 7.5 of ANSI Z88.2-1969, entitled "Practices for Respiratory Protection," explains how to test for facepiece leakage

shown a film illustrating the various types of respirators, their use and proper function, use of a banana oil (isoamyl acetate) atmosphere for fitting, and how to place and fasten a respirator properly, including tightening for good fit. Ryan testified that CF&I also gave the employees a banana oil test. Ryan stated that at the settlement conference that followed his 1977 inspection, he told CF&I that respirators should be fitted in banana oil or irritant smoke. He testified that the training film shown to newly hired CF&I employees stated that if an employee detected the presence of banana oil, a new respirator would be supplied. During the inspection, Ryan learned that this was not being done. He stated that CF&I's plant superintendent and safety director told him that employees who detected banana oil while wearing their respirators in the test atmosphere[7] were nevertheless sent to work in the regulated area without being fitted with a different

with a positive or negative pressure test. It states:

> (1) Positive Pressure Test. Close the exhalation valve and exhale gently into the facepiece. The face fit is considered satisfactory if a slight positive pressure can be built up inside the facepiece without any evidence of outward leakage of air at the seal. For most respirators, this method of leak testing requires that the wearer first remove the exhalation valve cover and then carefully replace it after the test.
>
> (2) Negative Pressure Test. Close off the inlet opening of the canister or cartridge(s) by covering with the palm of the hand(s) or by replacing the sealing inhale gently so that the facepiece collapses slightly, and hold the breath for ten seconds. If the facepiece remains in its slightly collapsed condition and no inward leakage of air is detected, the tightness of the respirator is probably satisfactory.

A test atmosphere is "an enclosure in which (1) the user can exist with the equipment on, and (2) a test contaminant of sufficient can be placed." NIOSH, *Respirator Protection* [illegible] to Employees, *Manual*, at 76 (1976).

respirator. According to Ryan, CF&I's management told him that this practice was followed throughout the coke oven industry. Ryan also stated that records supplied to OSHA by CF&I's industrial hygiene staff showed that prior to the inspection, twenty-eight employees, who worked in the regulated area, smelled banana oil while wearing respirators in a test atmosphere but were not supplied with different respirators.

In his brief, the Secretary argues that section 1910.134(e)(5), as incorporated by section 1910.1029(g)(3), requires the employer to assure that the respirators worn by its employees are "fitted properly." He maintains that a qualitative fit test conducted in a test atmosphere of irritant smoke or banana oil is required. If the employee fails the test because he can detect the substance surrounding the respirator, the Secretary states that the employer must then provide the employee with a properly fitting respirator or remove him from the workplace. The union agrees with this argument.

CF&I contends that neither a banana oil or irritant smoke test is mandatory under section 1910.134(e)(5). In its view it complied with the standard by providing a positive-negative pressure test to employees at the outset of their employment.

The judge found that CF&I willfully violated section 1910.1029(g)(3) by failing to provide respirators with a different size facepiece to employees who failed the banana oil test. The judge rejected CF&I's argument that administration of a positive-negative pressure test complies with section 1910.134(e)(5) since this test is not done in a test atmosphere as required by the standard. He also reasoned that by failing to replace the respirators of those employees who failed the banana oil test, CF&I had failed to comply with the "fitted properly" requirement of section 1910.134(e)(5).

The gravamen of the alleged violation is CF&I's failure to assure that employees in the regulated area were equipped with respirators that fit, which the Secretary asserts must be determined through use of a test atmosphere. The Secretary cites section 1910.1029(g)(3), which is part of the "Respiratory protection" section of the coke oven emissions standard. However section 1910.1029(g)(4)(i), which is also a part of the general "Respiratory protection" section, specifically covers the fit of respirators. It provides that "the employer shall assure that the respirator issued to the employee exhibits minimum facepiece leakage and that the respirator is fitted properly." In our opinion, section 1910.1029(g)(4)(i) is specifically applicable to the cited condition and should have been cited by the Secretary instead of section 1910.1029(g)(3).

We read section 1910.1029(g)(3) as a training standard; it does not require the employer to assure proper fit of an employee's respirator. Section 1910.1029(g)(3) requires the employer to establish a respiratory protection program in compliance with section 1910.134. Section 1910.134(b), entitled "Requirements for a minimal acceptable program," states that the user shall be "*instructed* and *trained* in the proper use of respirators and their limitations." (Emphasis added.) At no place does section 1910.134(b) state that the employer must assure proper fit of respirators. The Secretary nevertheless refers to language in section 1910.134(e)(5) concerning proper fit and a test atmosphere in support of his argument that section 1910.1029(g)(3) requires the employer to assure proper respirator fit. We do not agree. Section 1910.134(e)(5) requires instruction to users in the selection, use, and maintenance of respirators. It then states that training shall provide the employees "an opportunity," to among other things, "handle the respirator, have it fitted properly, test its face piece-to-face seal, . . . [and] wear it in a

test atmosphere." We interpret section 1910.134(e)(5) as requiring the employer to instruct employees during training in such things as how to select a respirator, how to put on a respirator, how to achieve a proper fit and how to obtain a face-piece seal. The employees must also be given hands-on-experience with the respirators during training. Accordingly, each employee must be given a respirator and the opportunity to wear it, including the chance to wear the respirator in a test atmosphere, during training. However, section 1910.134(e)(5) does not, as the Secretary asserts, require that the employer assure proper fit of the respirator or specify how this is to be done. As we noted previously, section 1910.1029(g)(4)(i) covers this safety requirement.[10]

It is a well established principle of statutory construction that a statute or regulation must be read as a whole and that all parts of a statute, if at all possible, are to be given effect. *See Simplex Time Recorder Co.*, 85 OSAHRC ____/____, 12 BNA OSHC 1591, 1594 n.6, 1986 CCH OSHD ¶ 27,456, p. 35,569 n.6 (No. 82-12, 1985); *Northwest Airlines, Inc.*, 80 OSAHRC 87/B5, 8 BNA OSHC 1982, 1989, 1980 CCH OSHD ¶ 24,750, p. 30,487 (No. 13649, 1980). Here the Secretary's own standards make a distinction between training in respirator use and assurance of proper respirator fit: Section 1910.1029(g)(3) requires the establishment of a respirator protection program while section 1910.1029(g)(4)(i) requires respirators to be fitted properly. It would therefore

[10] A second sentence in section 1910.1029(g)(4)(i) had provided that quantitative fit tests shall be performed annually for each employee who uses a non-powered, particulate filter respirator. This provision was struck down by the *ISM* court and was deleted by the Secretary after the *ISM* litigation. 50 Fed. Reg. 17852 (1985). It has not been repromulgated by the Secretary.

be anomalous to equate training with proper respirator fit. *See United States Steel Corp.*, 77 OSAHRC 64/C8, 5 BNA OSHC 1289, 1296, 1977-78 CCH OSHD ¶ 21,795, p. 26,225 (Nos. 10825 & 10849, 1977). Indeed to interpret section 1910.1029(g)(3) as requiring the employer to assure proper respirator fit would read out of the standard any meaning to 1910.1029(g)(4)(i).

Moreover, the source standard from which section 1910.134 was derived makes clear that use of a test atmosphere to determine respirator fit is not mandatory. In this case, the source standard is ANSI *Z*88.2-1969. Like section 1910.134(e)(5), the ANSI source standard requires the use of a test atmosphere for the training of employees. ANSI *Z*88.2-1969, § 7.4. However, the ANSI source standard does not state that the employer must assure proper respirator fit during training; it also makes clear that a test atmosphere is not mandatory for determining facepiece fit.[11] The ANSI provision states that "[p]otential users of respirators *should* also be required to test their facepiece fit by wearing the respirator under realistic test conditions." (Emphasis added.) ANSI *Z*88.2-1969, § 7.5. Like most ANSI standards, ANSI *Z*88.2-1969 contains a provision explaining the significance of the words "shall" and "should." Section 1.3 states:

> 1.3 "*Shall" and "Should"*. The provisions of this standard are mandatory in nature where the word

[11] The successor to ANSI *Z*88.2-1969, ANSI *Z*88.2-1980, requires for the first time that wearers of negative pressure respirators be given either a qualitative fit test, such as a banana oil test (see ANSI *Z*88.2-1980, Appendix 3 A5.2), or a quantitative fit test, which tests fit by numerical measurement with instruments that compare contaminant levels inside and outside the respirator. See ANSI *Z*88.2-1980, § 6.11 and Appendix 3 A 6.

> "shall" is used and advisory in nature where the word "should" is used.

Since the ANSI source standard does not require the use of a test atmosphere to determine respirator fit, we do not interpret the OSHA standard to require use of a test atmosphere to determine respirator fit.[12]

In the instant case, CF&I raised the applicability of section 1910.1029(g)(4)(i), and the compliance officer acknowledged that it applied. He also acknowledged that he might have cited the wrong standard.[13] The Secretary,

[12] Section 1910.134(e)(5) was adopted under section 6(a) of the Act without regard to the comment and notice rulemaking provisions of section 6(b) and the Administrative Procedure Act, 5 U.S.C. § 553. For this reason it cannot be substantially modified from its source. *Diebold, Inc. v. OSHRC*, 585 F.2d 1327, 1332 (6th Cir. 1978); *George C. Christopher & Son, Inc.*, 82 OSAHRC 9/A2, 10 BNA OSHC 1436, 1442-43, 1982 CCH OSHD ¶ 25,956, pp. 32,530-31 (No. 76-647, 1982).

[13] The compliance officer did not cite section 1910.1029(g)(4)(i) because it was his "understanding" that after the quantitative fit test provision was stricken by the *ASI* court, an agency policy statement directed inspectors not to enforce section 1910.1029(g)(4)(i). The compliance officer's belief, however, was erroneous. The compliance officer apparently based his belief on OSHA's Program Directive 300-10 (revision No. 1 dated October 30, 1978). This directive states:

> (7) *Respirator Fit Test (prior)*. Coke oven employers are required to perform respirator fit tests annually for each employee who uses a non-powered, particulate filter respirator. The preamble of the standard incorrectly describes the procedure for quantitative fit test. Since the record does not support the requirement for annual quantitative respirator fit testing, OSHA intends to conduct a separate rulemaking on that issue in the near future. In the interim, only a requirement for qualitative fit testing will apply.

The directive does not state that the first sentence of section 1910.1029(g)(4)(i), which requires that employers assure that

however, did not move to amend, see note 15, *infra*, and continues to allege a violation of section 1910.1029(g)(3).[14] We therefore must address whether the Secretary has proven a violation of section 1910.1029(g)(3).

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respirators are "properly fitted," is not to be enforced. In any event, the first sentence of the standard had not been struck down by the *ASI* court. It therefore continued to be in effect when the citations in this case were issued and the directive indicates that it continued to require qualitative fit testing.

[14] The Secretary has taken inconsistent positions regarding the interpretation of section 1910.134(e). In the 1979 version of OSHA's *Industrial Hygiene Field Operations Manual*, Ch. XII, section I (text as of January 1, 1979), reproduced in CCH Employment Safety & Health Guide, OSHA Field Operations Manual and Industrial Hygiene Field Operations Manual, ¶ 4488.40 (1979), OSHA instructed its compliance officers that "respirator fit" can be checked by one of the following methods:

> (i) Positive Pressure Test: . . . . [Detailed instructions omitted.]
> (ii) Negative Pressure Tests: . . . . [Detailed instructions omitted.]
> (iii) Manufacturer's Instructions. Follow the directions provided by the respirator manufacturer. The [compliance officer] is not permitted to use[] irritating chemicals to test facepiece fit.
> (iv) Chemicals. Some employers may use irritant smoke or isoamyl acetate [banana oil] for the respirator fitting test. . . .
> Although OSHA does not recommend using chemicals, it is a common practice and no standard directly prohibits it unless the permissible exposure limits are exceeded.

The Manual instructed the compliance officer that when he observes employees to determine proper fitting, he is to see if fitting "is done by either negative or positive pressure test or other methods as used by the employer as described in paragraph (2)(b)(iii) and (iv). . . ."

After the hearing in this case, the Secretary, prompted in part by "a request for compliance procedures" and what he characterized as "litigation activities," issued a policy directive on section 1910.134(e)(5) to "clearly establish enforcement policy on the fit-testing issue." That directive is Instruction CPL 2-2.29(BNA 27, 1980), *reproduced in* 1980-81 CCH OSHA Decisions ¶ 12,105. It states that "[a] 'test atmosphere' must be applied to assess the quality of fit." *Id.* ¶ I. 2.

The Secretary alleges a violation of section 1910.1029(g)(3) because twenty-eight employees were not given a proper fitting respirator after failing the banana oil test. The mere fact that employees entered a test atmosphere and encountered facepiece leakage does not mean, however, that their training was inadequate. Indeed the Secretary's respirator expert, Dr. Pritchard, testified that every respirator leaks to one degree or another and that the odor threshold between individuals for detecting banana oil varies. Dr. Pritchard also noted that an employee could smell banana oil because he does not place the mask on his face properly, and not because the mask size is incorrect. In order to prove a violation of section 1910.134(e)(5) the Secretary must show that employees were not adequately instructed in the proper selection, use, and maintenance of respirators or were not permitted to handle the respirator under certain conditions. CF&I had a training program that included instruction in the selection and use of respirators and the avoidance of facepiece leakage. Employees were given an opportunity to handle the respirator under various conditions and to wear it in a test atmosphere under the guidance of an industrial hygienist. The fact that some employees detected the banana oil while in the test atmosphere does not establish by itself that the instructions or training otherwise provided were inadequate. We thus conclude that the Secretary failed to establish a violation of 29 C.F.R. § 1910.1029(g)(3). Accordingly, we vacate the citation for violation of this standard.[15]

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[15] Since the parties did not expressly or impliedly consent to try a violation of section 1910.1029(g)(4), we conclude it would be improper to amend to allege a violation of this standard. *See McWilliams Forge Co.*, 84 OSAHRC ____, 11 BNA OSHC 2128, 1984 CCH OSHD ¶ 26,979 (No. 80-5868, 1984).

Citation 3: Smoking and Training.

Items two and three of this citation are in dispute. Item 2 of the citation alleges that CF&I violated 29 C.F.R. § 1910.1029(i)(5)(i) by allowing two employees to smoke in the north and south coal bin and door repair areas during OSHA's inspection. This standard states:

> (i) The employer shall assure that *in the regulated area,* food or beverages are not present or consumed, *smoking products are not present or used,* and cosmetics are not applied, except that these activities may be conducted in the lunchrooms, change rooms and showers required under paragraphs (i)(1)-(i)(3) of this section.

(Emphasis supplied.) There is no dispute that the employees in question were smoking in these areas. There also is no dispute that these areas are beyond the pinion wall. The judge affirmed this item based on his conclusion that these areas were part of the "battery ends" and, thus, part of the regulated area. As explained above, we conclude that the areas in question – the north and south door repair and coal bin facilities – are not part of the "regulated area" because they are beyond the "battery ends." Accordingly, we reverse the judge's decision and vacate this item.

Item 3 of this citation involves an alleged violation of the employer training standard at 29 C.F.R. § 1910.1029(k)(1)(ii). Item 3 alleges:

> 29 CFR 1910.1029(k)(1)(ii): The employer did not institute an effective training program for Coke oven employees working in the regulated area or at the time of initial assignment to the regulated area, in that:
>
> a) New employees, with no prior work experience in the regulated area, did not receive adequate

> on-the-job training on the proper work practice and written procedures to minimize Coke oven emissions prior to assignment in the regulated area.
>
> * * *
>
> c) Employees with experience in the regulated area, did not receive adequate instructions and on-the-job training in the proper work practices and written procedures to minimize Coke oven emissions prior to assignment to a new job position they have not worked before.

The cited standard provides:

> (k) *Employee information and training* – (1) *Training program.*
>
> * * *
>
> (ii) The training program shall be provided as of January 27, 1977 for employees who are employed in the regulated area at that time or at the time of initial assigment to a regulated area.

Essentially, this item alleges that CF&I violated the standard by failing to provide "written instructions" and "on the job" training to new employees upon assignment to the regulated area as well as to "experienced" employees upon re-assignment in the regulated area. The judge determined that the standard required employers only to provide written instructions to employees upon their "initial assignment to the battery." He therefore affirmed this citation to the extent that it alleged that CF&I violated the standard by failing to provide written instructions to employees who were newly-assigned to the regulated area. He vacated this item to the extent that it alleged that CF&I violated the standard by failing to provide (1) "on-the-job"

training to employees newly assigned to the regulated area, (2) written instructions to experienced employees who were re-assigned to different positions on the battery, and (3) "on-the-job" training to experienced employees who were reassigned to new positions on the battery.

CF&I does not take issue with the judge's partial affirmance of this item.[16] Relying on various portions of the preamble, the union, however, asserts that the standard requires more extensive training for newly-assigned and experienced employees.[17] Although it concedes that the standard does not state all of the types of training that employers must provide, it asserts that "reasonable and feasible" training must be made available and cites several cases, including *Horne Plumbing & Heating Co. v. OSHRC*, 528 F.2d 564 (5th Cir. 1976), for support. The Secretary also asserts that the standard requires on-the-job

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[16] The Secretary did not petition for review of the judge's partial vacation of the item.

[17] The union cites the following language from the preamble in support of its claim that more extensive training was required:

> "A major portion of the effort in the control of coke oven emissions involves work practices. These include regular inspection, maintenance, cleaning and repair of all the equipment and strict adherence to prescribed schedules. *Employees must be properly trained in such work practices and their importance.* The proper training of all employees will require time."

41 Fed. Reg. at 46,761 (emphasis supplied by union).

> "Such a written program assures that all the elements are considered and can be used not only to evaluate the effectiveness of the program *but also to train employees*. For example, in implementing the cleaning requirement, the written program could specify job assignments, cleaning tools and a checkoff or reporting system for the operating crew depending on the needs of that particular plant."

41 Fed. Reg. at 46,767 (emphasis supplied by union).

training for new and experienced employees. He also relies on the preamble and argues that only through such training can the employer be assured the employees knew the proper work practices.

As the judge found, the text of the standard requires that employees be provided with written instructions only upon their "initial assignment" to the regulated area. The preamble to the standard also does not state or imply that employers are required to provide anything more than initial training to employees who are newly assigned to the regulated area. We therefore agree with the judge's conclusion that CF&I did not violate the standard by failing to provide on-the-job training to new employees and written instruction as well as on-the-job training to experienced employees.

The cases cited by the union in support of its argument also are inapposite. In none of the cases did the Commission or the courts read an additional training requirement into an employee training standard. Rather, these cases held that in order to sustain a defense that it neither knew nor could have known of the occurrence of a violation, an employer must show that it provided "reasonable and feasible" training to it employees. Based on the foregoing, we affirm the judge's decision to vacate that portion of the citation which alleged that CF&I violated section 1910.1029(k)(1)(ii) by failing to provide on-the-job training to new and experienced employees and written instructions to experienced employees.

Accordingly, we vacate citations 1, 2, item 2 of citation 3, and item 3 of citation 3 to the extent that it alleged that the employer was required to do more than allow em-

ployees to review the written procedures for their job when initially assigned to the regulated area.

FOR THE COMMISSION

/s/ Ray H. Darling, Jr.

RAY H. DARLING, JR.
Executive Secretary

DATED: SEP. 12, 1986

WALL, Commissioner, dissenting in part:

I agree with the Commission's disposition of citations 1 and 3. I respectfully dissent, however, from the decision to vacate citation 2, concerning training in the wearing of respirators. I conclude that section 1910.134(e)(5) applies, that it was violated, and that the violation was willful.

To restate the facts of this issue, during the course of training in the wearing of respirators, some of CF&I's employees wore respirators in a test atmosphere of banana oil. Twenty-eight of the employees reported smelling the banana oil, which indicated that their respirators did not fit properly. They were not supplied with respirators that did fit; rather they were sent to work in a toxic atmosphere wearing respirators that were demonstrably unsuited for the purpose.

The majority emphasizes that the standard in question, contained in paragraph 1910.134(e)(5), is a training standard. I don't take serious issue with this because, whether it is a training standard or a use standard the evidence clearly demonstrates that it was violated. The governing standard, paragraph 1910.1029(g), is headed "*Respiratory Protection.*" Paragraph (g)(3) requires that "The employer shall institute a respiratory protection program in accordance with § 1910.134 of this Part." Paragraph 1.34(b) is headed "*Requirements for a Minimal Acceptable Program.*" Paragraph 1910.134(e)(5), the standard which was cited in the case, is headed "*Use of Respirators.*" Paragraph (e)(5), in its pertinent part, states that "For safe *use* of any respirator, it is essential that the user be properly instructed in its . . . *use* . . . . Training shall provide the men an opportunity to handle the respirator, *have it fitted properly*, . . . and . . . to wear it in a test atmosphere." (Emphasis added)

CF&I does not deny that 28 employees failed a so-called "banana oil test," and were then sent into the area of coke oven emissions with respirators that obviously did not fit. This clearly establishes that the 28 employees were not provided with respirators that fit, were not trained to comprehend the proper fit of respirators, or to use the respirators properly. Thus, even if paragraph 1910.134 (e)(5) is construed as a respirator training standard, the 28 employees certainly were not trained in the use of respirators. Nor could it seriously be argued that this was a minimal acceptable program.

The suggestion that CF&I could have been cited under paragraph 1910.1029(g)(4) does not affect my conclusion. CF&I may have breached another respirator standard as well, but this does not mean that it was not properly cited under paragraph 1910.134(e)(5). The 1910.134(e)(5) citation alleged a failure to train in the use of respirators and, expressly, that employees did not have an opportunity to have their respirators fitted properly. The gravamen of the charge concerns the initial fitting of respirators; a process that is ordinarily associated with the indoctrination or training phase of respirator use. Although the facts of this case might also support a violation of 1910.1029(g)(4), the respirator usage standard, the Secretary has a legitimate concern about the initial fit of respirators, and chose to allege that the employees were not trained properly under paragraph 1910.134(e)(5). This is within his prosecutorial discretion, and is not grounds for vacating the citation.

Regarding the use of banana oil, the question of whether a banana oil test was required, or what test is required, is beside the point. Whether Respondent was required to use the banana oil test, it *did* use the banana oil, and it demonstrated that the respirators did not fit. Given this knowledge, by whatever test the knowledge was obtained, it can hardly be said that the employees were

properly trained in the use of respirators. The purpose of paragraph 1910.134(e)(5) is to ascertain whether the respirator provides protection (have it fitted properly), and to prepare employees to work and function in a toxic environment.

This is clear not only from the language of the test atmosphere provision of 1910.134(e)(5), but also from the ANSI standard which is the source of the OSHA standard. As the majority notes, we may generally not construe an OSHA standard adopted under section 6(a) of the Act, 29 U.S.C., § 665(a), in a way that is different from its ANSI ancestor. Under the 1969 ANSI standard, the positive and negative pressure tests were only *field* tests. Section 7.5 of the ANSI standard states that "[t]o assure proper protection, the facepiece fit shall be checked by the wearer *each time he puts on the respirator*. This may be done by following the manufacturer's facepiece-fitting instructions such as these simple *field* tests: . . . ." (Emphasis added.) What then follows in sections 7.5(1) and (2) are detailed descriptions of the positive and negative pressure tests. The test atmosphere procedure is described next as a means for employees "to *test facepiece fit* by wearing the respirator under realistic test conditions." ANSI section 7.5, third paragraph (emphasis added). The passage goes on to state that if an employee does not detect the odor of banana oil, "he has a good fit." Thus, the ANSI standard contemplates that the "test atmosphere" provision of the training standard is a means for fitting a respirator properly during training. Another portion of this same paragraph demonstrates that training the employee in the achievement of proper fit is not all that the standard expects. The third paragraph of section 7.5 makes clear that the results of a banana oil test could well require the employer to provide another respirator to the employee if

the first allows the employee to smell banana oil. That paragraph states in part:

> If [the respirator wearer] detects the odor [of banana oil], he should retreat to fresh air, *readjust the facepiece*, and repeat the test. If leakage is still noted, it can be concluded that this particular respirator will not protect the wearer. *The wearer should not continue to tighten the headband straps until they are uncomfortably tight, simply to achieve a gas-tight fit.* If fitted too tightly, the wearer will not wear the respirator or will wear it fitting comfortably loose and will not have a gas-tight seal. (Emphasis added)

That a respirator's straps may not be tightened by the employee after a point means that unless the employer monitors the result of the banana oil test and provides a different respirator, there can be no assurance that *any* amount of employee training will help an employee achieve proper fit.

I also find that the violation was willful. A violation is willful if it is committed voluntarily with either an intentional disregard for the requirements of the Act or plain indifference to employee safety. *Simplex Time Recorder Co.*, 85 OSAHRC ____, 12 BNA OSHC 1591, 1595, 1985 CCH OSHD ¶ 27,456, p. 35,571 (No. 82-12, 1985). In a training film, CF&I informed employees that they would be provided with a different respirator if they failed the banana oil test. It clearly understood that the fit of respirators was to be evaluated in a "test atmosphere." It administered banana oil tests, yet failed to provide different respirators to at least 28 employees who failed. These 28 employees then were sent to the regulated area and in several instances were exposed to toxic coke oven emissions above the permissible exposure limit without proper respiratory protection. This conduct demonstrates, at the very least, plain indifference to employee safety.

APPENDIX D

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

OSHRC Docket No. 79-4786

SECRETARY OF LABOR, COMPLAINANT

v.

CF&I STEEL CORPORATION, RESPONDENT

AND UNITED STEELWORKERS OF AMERICA, AFL-CIO, LOCAL 2102, AUTHORIZED EMPLOYEE REPRESENTATIVE

DECISION AND ORDER

Quentin P. McColgin, Administrative Law Judge:

This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. § 659(c), involving alleged violations of section 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2).[1] Jurisdiction over the parties and the subject matter is admitted in the pleadings.

Hearings in this matter were conducted in Pueblo, Colorado commencing February 25, 1980 and ending February 29, 1980. The affected employees were represented throughout these proceedings by the United Steelworkers of America, AFL-CIO, the authorized employee representative (AER).

[1] "Each employer shall comply with Occupational Safety and Health Standards promulgated under this chapter."

At the conclusion of the hearings, the parties were invited to submit proposed findings of fact, conclusions of law and briefs in support thereof as well as reply briefs. (Tr. 891)[2] All parties submitted briefs; however, complainant did not submit proposed findings of fact or conclusions of law. Subsequently, respondent and the AEAR submitted reply briefs. Thereafter, respondent filed a letter dated May 30, 1980 containing further argument. In the absence of objection by the other parties, this letter was not stricken from the record even though it was unauthorized under the prescribed briefing schedule. By order dated June 5, 1980, the other parties were granted an opportunity to respond to the matters contained in respondent's May 30, 1980 letter. The letter dated June 2, 1980 from the AEAR constitutes the only submission responsive to that authorization.

Having heard and observed the witnesses who testified during the hearings, and having considered the pleadings, the admissions and the other evidence presented at hearing together with the post-hearing submissions by the parties, the undersigned hereby makes the findings, conclusions and order set forth below. To the extent that proposed findings of fact or proposed conclusions of law have not been adopted in this decision, they are rejected as being inaccurate or unnecessary to the disposition of this case. To the extent that there are any pending motions which have not been expressly granted herein, they are DENIED.

[2] The following abbreviations shall be used in this decision:

Tr. — Transcript
C — Complainant's Exhibit
R — Respondent's Exhibit

FINDINGS OF FACT

1. Respondent's plant is located near Pueblo, Colorado and is a fully integrated steel mill. (Pleadings)

2. Within this plant, respondent operates a coke plant. (Pleadings)

3. Respondent has three adjoining coke oven batteries designated as Batteries B, C and D. Battery B is located on the south end of the configuration, Battery C is in the middle, and Battery D is located on the north end. (Tr. 678-679, C-3, R-36)

4. At each end of each of respondent's three batteries is a pinion wall. (Tr. 728-729, R-59)

5. A pinion wall is composed of large blocks of refactory (Tr. 686), five to six feet wide (Tr. 729), which extends vertically from ground level to topside and which basically serve as a bulkhead. (Tr. 728, R-59)

6. The "battery end" is considered throughout the industry to be the pinion wall. (Tr. 679-680, 728)

7. Respondent does not have any coal loading areas between its batteries. (Tr. 240)

8. Respondent established the pushcar machines and the Larry car machines as regulated areas when they were being operated between the south pinion wall of Battery B and the north pinion wall of Battery D. (Tr. 727-728)

9. Respondent did not establish the push car machines and the Larry car machines as regulated areas when they were positioned beyond the pinion walls. (Tr. 727-728)

10. Immediately north of the north pinion wall of Battery D and separated by a small, open area is the lunchroom and foreman's office. (Tr. 735, 736, 738, R-59)

11. Above the aforesaid foreman's office and lunchroom facilities is the north coal bin area which is on the same horizontal plane as the topside of Batteries B, C and D. (Tr. 735, 736, C-1, C-3, R-7 and R-58)

12. Immediately north of the foreman's office and lunchroom described above is the north door repair facility which is on the same horizontal plane as the office, and the lunchroom. (Tr. 737, R-58, R-61 and R-62, R-61 and R-62)

13. Immediately south of the south pinion wall of Battery B is substantially the same configuration of facilities, positioned inversely, as are located north of the north pinion wall of Battery D. (Tr. 700, C-3)

14. The coke ovens and other facilities described above essentially consist of the following three levels:

a. Ground level where the tracks for the pusher machine and quench car are located (R-61 and R-62);

b. Bench level where the door machine tracks run, the lunchroom, the foreman's office, the door repair facilities and the doors to the coke ovens are located (R-61 and R-62; and

c. Topside where the Larry car tracks and coal bins are located. (C-1, R-4, R-7, R-28 and R-30)

15. The tracks at ground level and bench level extend from the south end of the south door facility to the north end of the north door facility. (C-3, R-2 and R-61)

16. The tracks at topside extend from the south end of the south coal bin area to the north end of the north coal bin area. (Tr. 548, C-1 and R-7)

17. Push car machine Nos. 1, 2 and 3 constitute machines that are operated on the push side of respondent's Batteries B, C and D. (Tr. 140, 329, 556, R-8 and R-34)

18. Larry car machines Nos. 1, 2 and 3 constitute machines that are operated on topside of Batteries B, C and D. (Tr. 737, 526, 553 and R-6)

19. By virtue of their exposure to coke oven emissions while in operation, pushcar machines 1, 2 and 3 and Larry-car machines 1, 2 and 3 are contaminated. (Tr. 143-144)

20. Doors to respondent's coke ovens are contaminated with coke oven emissions (Tr. 813)

21. Coke oven emissions in excess of the permissible exposure limit have occurred in respondent's facilities which are beyond the pinion walls of Batteries B, C and D. (C-22)

22. The respirator training provided to respondent's employees prior to assignment to regulated areas consisted of the provision of respirators, coupled with instructions on its use and how to do a positive/negative fit test. (Tr. 101, 102, 772 and 773)

23. Qualitative fit testing in a test atmosphere was not provided to respondent's employees prior to their initial assignment in regulated areas. (Tr. 103, 819)

24. The positive/negative fit test does not meet the requirement of testing in a test atmosphere. (Tr. 462)

25. The two most common types of test agents which meet the test atmosphere requirement are isoamyl acetate (banana oil) and irritant smoke. (Tr. 459)

26. Irritant smoke is a less subjective; hence, a more reliable testing agent than isoamyl acetate. (Tr. 461, 490)

27. Because a positive/negative pressure fit test can easily give a false indication of fit, it is an unreliable means of determining whether a respirator fits properly. (Tr. 462-463)

28. If the testing agent is smelled during a qualitative fit test, the respirator does not fit properly.

29. Respondent failed to provide and assure the use of appropriate protective clothing by its employees. (Tr. 39, 274, 411)

30. Respondent's employee who was not provided with appropriate protective clothing, was exposed to the hazard of flames and extreme heat generated by the coke ovens. (Tr. 39-40, 440, C-2)

31. Respondent's employees who were not provided with appropriate protective clothing, were exposed to the hazard of coke oven emissions which could collect on their clothing. (Tr. 81-82, 95, 274, 286, 411, C-2)

32. Respondent failed to assure that smoking products were not present or used in the regulated area. (Tr. 59 & 248)

33. Respondent's training program which was provided prior to the initial assignment of employees to the regulated area, did not include a review of the written procedures pertaining to work practices. (Tr. 100-101)

CONCLUSIONS OF LAW

1. Respondent violated 29 C.F.R. § 1910.1029(d)(2)(i) in that it did not establish the machinery and areas specified in Citation No. 1, Item No. 1, as regulated areas.

2. The aforesaid violation was serious.

3. Respondent failed to comply with 29 C.F.R. § 1910.134(e)(5) in that respondent's respirator training program did not provide respondent's employees an opportunity to have their respirators fitted properly.

4. The failure of respondent to comply with the aforesaid provision of the Respiratory Protection standard (29 C.F.R. § 1910.134), constitutes a violation of 29 C.F.R. § 1910.1029(g)(3).

5. The aforesaid violation constitutes a willful violation within the intent and meaning of the Act.

6. Respondent violated 29 C.F.R. § 1910.1029(h)(1)(i) in that it failed to provide appropriate protective clothing to its employees.

7. The aforesaid violation constitutes a repeated violation within the intent and meaning of the Act.

8. Respondent violated 29 C.F.R. § 1910.1029(i)(5)(i) in that respondent failed to assure that smoking products were not present or used in the regulated area.

9. The aforesaid violation constitutes a repeated violation within the intent and meaning of the Act.

10. Respondent violated 29 C.F.R. § 1910.1029(k)(1)(ii) in that the training program that was provided to employees prior to their initial assignment to the regulated area, did not include information concerning the written procedures specified under 29 C.F.R. § 1910.1029(f)(7).

11. The aforesaid violation constitutes a repeated violation within the intent and meaning of the Act.

DISCUSSION

Citation No. 1, Item No. 1

The first charge involves an alleged serious violation of 29 C.F.R. § 1910.1029(d)(2)(i) which provides:

> The employer shall establish the following as regulated areas: (i) The coke oven battery including topside and its machinery, push side and its machinery, coke side and its machinery, and the battery ends; the wharf; and the screening station.

The specific allegations, as set forth in Citation No. 1, Item No. 1, are:

> 29 C.F.R. § 1910.1029(d)(2)(i): The employer did not establish the following areas of the Coke Plant as regulated areas:
> (a) Push car machine Nos. 1, 2 and 3;
> (b) larry car machine Nos. 1, 2 and 3;
> (c) topside north coal bin area;
> (d) topside south coal bin area;
> (e) bench level north door repair facility;
> (f) bench level south door repair facility.

Complainant proposes a penalty of $1,000.00 for this item.

Respondent does not dispute that the machinery specified in the citation were not established as regulated areas when they were positioned in certain areas. Respondent also does not dispute that the four specified work areas were not established as regulated areas. Further, respondent does not dispute that its employees had access to the machinery and areas which complainant contends should have been regulated. Nevertheless, respondent does dispute whether the standard requires that the machinery and areas be established as regulated areas.

In essence, respondent argues for a narrow interpretation of what is included under the standard as "battery ends." In support of this position, respondent relies upon 29 C.F.R. § 1910.1029(b) which defines coke oven battery as "a structure containing a number of slot-type coke ovens" coupled with the unrefuted evidence that the industry considers the "battery ends" to be the pinion walls.

Complainant and the AER argue for a broader interpretation of the standard. They argue that the "battery ends" include the coal bin areas and the door repair facilities which are beyond the pinion walls. The essence of this argument is that all of these facilities, as well as the coke ovens themselves, are one continuous structure; hence, the coal bin areas and the door repair facilities should be considered to be the "battery ends" as that term is used in the standard.

Thus, as stated by respondent, the critical issue presented here is what is meant by the term "battery ends" as that term is used in the standard.

The provision which prescribes the establishment of regulated areas and defines such areas is the key to the entire coke oven emission standard. As described in the statement of basis and purpose for the coke oven emission standards entitled "Exposure to Coke Oven Emissions" (Preamble), 41 Fed. Reg. 46,742-90 (1976), it defines the areas wherein access is limited to authorized persons. 41 Fed. Reg. at 46,756. It further serves to reduce the ingestion of coke oven emissions by prohibiting the presence or consumption of food or beverages, the presence or use of smoking products and the application of cosmetics in the areas defined as regulated areas. 41 Fed. Reg. at 46,776. Similarly, it requires, for those who work in the defined regulated areas, the use of hygiene practices and the provision of hygiene facilities (washing and showering facilities) so that coke emissions that are collected on employees will

be removed and not subsequently ingested. 41 Fed. Reg. at 46,776.

After considering the evidence and argument presented, the undersigned has determined to adopt the single structure interpretation advanced by complainant and the AER. The basis for this determination is that the battery looks like a single structure; that it was the intent of the promulgators of the coke oven emission standard to include within the regulated areas, work areas which are beyond the pinion walls of respondent's batteries; and that the purposes of the standard are best served by a broad interpretation of what is included in the term "battery ends," as that term is used in 29 C.F.R. § 1910.1029(d)(2)(i).

The most graphic evidence that respondent's facilities, beginning with the south door repair facility and extending to the north door repair facility, constitute a single structure is the aerial photograph depicted in C-2. Indeed, anyone, except possibly a member of the coke oven industry, would likely view such facilities as one structure despite the differences in the skyline created by the vertical extension of the coal bins beyond that of the other facilities comprising the structure. Nevertheless, these different facilities are all accessible to one another at one or more levels and are in close proximity to the ovens for reasons of efficiency or are required to be in close proximity to the ovens for reasons of health and safety.

Major support for the determination that the promulgators of the standard intended to include, within the term "battery ends," facilities which ~~are located~~ beyond the pinion walls is presented in the Preamble. Here, the "coal bunkers" are described as being located "~~at the~~ battery ends." 41 Fed. Reg. at 46,743. A "Coal bunker," which is primarily referred to in this case as a "coal bin," is a facility where coal is stored for transfer into special cars (Larry cars) that operate on rails at the top of the battery

(topside). 41 Fed. Reg. 46,743, (Tr. 548, R-4) From there, the coal is transferred by the Larry car to the individual coke ovens where it is deposited into the ovens from the top. It is clear from the record that these coal bunkers (coal bins) could not be expected to be located within the pinion walls of a battery. Instead, they would ordinarily be located either between the coke oven batteries (but outside the pinion walls that enclose each battery) or "at the battery ends." In either case, the coal bunker would be beyond the pinion walls of the coke oven battery. Thus, it is clear that the Secretary, in using the term "battery ends," contemplated facilities and workplaces that were located beyond the pinion walls. It is further clear that the Secretary, in using the term "battery ends," in 29 C.F.R. § 1910.1029(d)(2)(i) contemplated that such areas include the coal bunkers.

It is the express intention of the promulgators of the standard to include within the regulated areas, all work areas wherein the permissible exposure limit to coke oven emissions could be exceeded. 41 Fed. Reg. at 46,757. Here, respondent's own documents show that the permissible exposure limit has been exceeded in the facilities which are beyond the pinion walls of respondent's batteries. (C-22) For this reason, it is believed necessary and appropriate to adopt the broad interpretation of "battery ends" advanced by complainant and the AER in order to give effect to this express intent.

The permissible exposure limit to coke oven emissions is 150 micrograms per cubic meter of air (150 ug/m^3) averaged over an 8-hour period. 29 C.F.R. § 1910.1029(c). While there are no area samples in evidence which were taken in either the coal bin areas or either of the door repair facilities areas, samples were taken in the north and south lunchrooms which are immediately below the coal bins and, at bench level, between the door repair facilities

and the pinion walls of the adjacent coke oven battery. These samples reflect a reading in the north lunchroom which approach the permissible exposure limit (142.85 ug/m^3) and a reading in the south lunchroom area which substantially exceeds the permissible exposure limit (250.00 ug/m^3). (C-22) It is clear, from this evidence, that the permissible exposure limit "could be exceeded"—indeed, has been exceeded—in work areas adjacent to respondent's coke ovens but beyond the pinion walls. Furthermore, it is found that such exposure limit could be exceeded in the four specific areas cited in the citation.

The permissible exposure limits could be exceeded in the coal bin areas due to the proximity of these areas to the primary source of coke oven emissions—the coke ovens themselves. These coal bins are approximately 25 feet from the nearest coke oven. (Tr. 696, 726, R-59) The sides of the coal bins nearest the ovens are exposed. (R-4, R-28) Thus, depending upon wind direction, the dozens of visible leaks of coke oven emissions emanating from the coke ovens that are observed at each of the inspections conducted by respondent, could be expected to drift into the coal bin areas and could exceed the permissible exposure limit. (Tr. 651-655, C-22, R-24, R-25)

By virtue of the greater distance between the coke ovens and the door repair facilities, *vis-a-vis* the distance between the coke ovens and the coal bins, the permissible exposure limit is less likely to be exceeded from emissions emanating directly from the ovens in the door repair facilities. Nevertheless, the permissible exposure limit could be exceeded in the door repair facilities due to the presence there of coke doors which are contaminated by coke oven emissions. (Tr. 700, 812 and 813) Since torches are used on the contaminated doors, the coke oven emissions would then be volatized and could exceed the permissible exposure limit. (Tr. 142, 700, 812 and 813)

For the foregoing reasons, it is found that the "battery ends" as that term is used in 29 C.F.R. § 1910.1029(d)(2)(i) includes the north and south coal bin areas and the north and south door repair facilities. Corollary, respondent's narrow interpretation of "battery ends" is rejected in that such interpretation would severely undermine the protections afforded by the standard.

Respondent's argument that the machinery is not required to be established as regulated areas when they are beyond the pinion walls is also rejected. Respondent concedes the necessity for establishing such machinery as regulated areas when they are in close proximity to the coke ovens themselves. However, the distinction drawn by respondent that such machines need not be established as regulated areas when outside the pinion walls is not delineated by the standard. Moreover, because the machinery could be expected to be contaminated with coke oven emissions even when they have been moved beyond the pinion walls, there is need for some, but not necessarily all, the protective requirements that come into play by designating the machines as regulated areas. (Tr. 141-143) Thus, the interpretation advanced by respondent is unfounded. Further, such interpretation would undermine the protections offered by the standard and is therefore rejected.

The remaining issue concerning this violation is the determination of an appropriate penalty. Subsumed within this issue is the threshold determination of whether the violation is serious within the intent and meaning of section 17(k) of the Act, 29 U.S.C. § 666(j).[3] This threshold issue will be addressed first.

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[3] ". . . (A) serious violation shall be deemed to exist . . . if there is substantial probability that death or serious physical harm could result from a condition which exists. . ." .

Respondent vigorously contends that the record in this case does not establish a serious violation. However, the Commission's recent decision in *Anaconda Aluminum Company*, 81 OSAHRC ____, 9 BNA OSHC 1460, 1981 CCH OSHD ¶ 25,300, No. 13102, 1981), is dispositive of all but two of the arguments advanced by respondent in support of its contention.

In *Anaconda*, the Commission, in finding a serious violation announced:

> [I]n deciding whether a violation is serious, we must look to the hazard against which the standard is intended to protect.[4]

The Commission reasoned that the standard's purpose was to protect *Anaconda*'s employees against contacting a life-threatening disease (cancer) by limiting such employees' exposure to coal tar pitch volatites (CTPV), a known carcinogen.[5] Thus, *Anaconda*'s failure to comply with the standard increased the risk of exposure to CPTV beyond the limits provided by the standard.

Applying that reasoning to this case, the hazard against which the standard is designed to protect is the same – cancer. However, the purpose of this standard is broader than to merely limit exposure. As previously outlined, it triggers the application of virtually all the various regulations designed to not only limit exposure but also to provide additional protections to employees such as the requirement of physical examinations to detect the symptoms of cancer. Thus, the failure to comply with the standard substantially increases the risk of exposure to coke oven emissions as well as substantially increases the possibility of harm to employees. Since coke oven emissions are also

[4] 9 BNA OSHC at 1477.

[5] *Id.*

carcinogenic, the possibility of death or serious physical harm, which could be expected to result from respondent's noncompliance with the standard, is as great or greater than was found to exist in *Anaconda*.

Nevertheless, respondent raises two arguments against classifying this violation as serious which are not addressed in *Anaconda*. First, respondent argues that the only evidence presented with regard to the health effects of coke oven emissions consisted of the Preamble to the standard which respondent characterizes as "uncorroborated hearsay." Respondent argues that such evidence, standing alone, "is insufficient as a basis for a finding that the violation is serious." (Respondent's Brief at 12)

This argument is unpersuasive. While the findings made in the Preamble to the standard is hearsay, it falls within the well-recognized exception to the hearsay rule codified as Fed. Rule of Evid. 803(8)(c) which provides:

> The following are not excluded by the hearsay rule. . . :
>
> (c) . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate a lack of trustworthiness.[6]

Since this evidence comes within such exception, it is considered to have sufficient probative value to support a finding that the violation was serious.

Additionally, respondent argues that the preponderance of the evidence in this case establishes that the violation would not result in death or serious physical harm. (Respondent's Brief at 18) In support of this argument, re-

[6] Since respondent unsuccessfully challenged the validity of the standard in *American Iron and Steel Institute v. OSHA*, 577 F.2d 825 (3rd Cir. 1978), respondent cannot challenge, in this proceeding, the trustworthiness of the Secretary's findings upon which the standard is based. In fact, respondent has not even raised this issue.

spondent relies upon the testimony of its in-house physician, Dr. Robert S. Young. (Tr. 831-873) Dr. Young, whose specialty is orthopedic surgery (Tr. 832), testified that on the basis of certain studies, which he conducted, he concluded:

> There was no increase in the death rate for either pulmonary, skin or urological carcinogens in the coke oven workers (of respondent) as opposed to the general steel people or as opposed to the general population. (Tr. 850-851)

After carefully considering Dr. Young's testimony and the studies upon which his conclusion is based, it is determined that no weight should be given to such evidence. The studies were not shown to be statistically valid. (Tr. 855-856, 858-859) Moreover, the studies themselves contain deficiencies which seriously brings into question their reliability.

There are essentially three studies which Dr. Young relied upon in reaching his conclusion. The first two are reported in the statement he prepared for submission in the rule-making proceeding. This statement is dated December 10, 1975 and was received in evidence as R-159. The third study is reported in the supplemental statement (R-159A) dated May 5, 1976, which was also prepared for submission in that same rule-making proceeding.

The first study consisted of an examination of the statistics of the computer department of St. Mary Corwins Hospital in Pueblo, Colorado for reports of malignancies of the pulmonary, skin and urinary systems for the years 1966-1974. (Tr. 850-851; R-159A) The pertinent figures reported in this study are:

(a) This hospital "provides care for approximately 75% of CF&I's employees. (R-159 at 2)

(b) "Coke oven employees comprise 3.89% of CF&I's work force." (R-159 at 3)

(c) "During the period 1966-1974, 66 CF&I employees died of either pulmonary or urinary cancer, none of skin cancer." (R-159 at 2)

(d) ". . . only five [of such deceased employees] worked in the coke plant." (R-159 at 2)

(e) Only two of the five were regular employees. (R-159 at 2-3)

(f) Only 3.03% of the deaths of CF&I employees attributable to malignancies were regular coke oven employees. (R-159 at 3)

In the absence of testimony from qualified experts indicating that such studies are statistically valid (which is the case here), no weight is given to this study. Furthermore, it suffers from patent deficiencies which seriously undermine its reliability.

The study assumes that those CF&I employees for whom the hospital "provides care" use the hospital exclusively for problems relating to malignancies. Since the evidence shows that this hospital does not specialize in pulmonary or urinary diseases but that another hospital located in Denver does (Tr. 864), common sense would indicate that some significant portion of the patients of the former hospital might go elsewhere for treatment of pulmonary and urinary diseases. Furthermore, this study is limited to those employees who died of the specified diseases and apparently does not include respondent's former employees who may have died of such diseases. (R-159 at 2) Thus, there is an unstated assumption that the persons who died of the specified diseases, while employed by respondent, are representative of those who died of such diseases after termination of their employment with respondent. Both assumptions seem unrealistic.

More importantly, there is insufficient information contained in the study to indicate whether the figures relied

upon by respondent have any statistical validity. The critical information lacking is the number of coke oven employees who use the hospital. For all that is known, the five coke oven employees who reportedly died of the specified diseases, may have been the only coke oven employees for whom the hospital provided care. All that is stated is that the hospital provided care for 75% of respondent's employees. Thus, the 3.9% subgroup of the work force which are reported as being employed in the coke ovens may or may not be proportionately represented by the statistics of that hospital.

Finally, even assuming the statistical validity of the study, the study does not necessarily support Dr. Young's conclusions. Since five of the sixty-six employees who reportedly died of malignancies worked in the coke ovens for some period of time, such employees accounted for a disproportionate percentage of the deaths attributable to malignancies (7.6%) compared to their percentage of respondent's total work force (3.9%).[7]

The second study is also found to be insufficient to support the conclusions reached by Dr. Young. The entire report of this study is set out as follows:

> During the period 1971-1974, annual examinations were offered to all coke plant employees at no charge. These examinations include general examination, with particular inspection of the skin, 14 x 17 chest X-ray and urinalysis. A copy of the examinations for 1975 are not completed. During the 1971-1974 period,

[7] The study discounts three of these employees on the apparent basis that they were not regularly employed at the coke ovens, each having worked there less than a year. However, there is no evidence in this record which would support the conclusion that exposure to coke oven emissions for such a short duration could not have an adverse effect on such employees' health.

> only 10.15% of subject employees availed themselves to this offered service. These examinations resulted in discovery on one skin malignancy, a facial lesion which was removed and diagnosed as actinic in origin. (R-159 at 3)

This study is first insufficient because it is limited to examinations of only 10% of coke plant employees who were employed at the coke plant during a 4-year period. Second, it is found insufficient because Dr. Young himself considered it "of very little significance." (Tr. 866)

The third study consisted of the examination of the available death certificates of those who were employed by respondent in 1953. (R-159A at 1 and 2) Here, it is reported that out of a total employment base of 470 in 1953, of which 233 were employed on the ovens,[8] Dr. Young could trace the health and work histories of 363. (R-159 at 2) Of these, 86 had died and Dr. Young reviewed the certificates of 63 of such individuals, 23 of which were employed at the ovens. (R-159A at 2)

The primary statistic reported in this study is that 14.3% of "CF&I coke oven workers" died of malignancies. (R-159A at 3) Dr. Young then compares this figure with the "nationwide percentage of hospital discharge fatality rates in 1972" for malignancies which is reported at 14.2% of all ages and 17.4% of those 65 and over.[9] Dr. Young then concludes on the basis of this comparison "the percentage of deaths of CF&I coke oven workers due to malignancies is *below* the national norm." (R-159 at 4)

[8] Curiously, about half the work force is reported to have been employed on the coke ovens in 1953. (R-159 at 1) In contrast, the first study reports that "coke plant employees comprise 3.89% of CF&I's work force. . ." (R-159 at 3) Such an apparent statistical discrepancy, which was not explained in the record, raises yet another serious question as to the rehability of the statistics reported by Dr. Young.

[9] R-159A at 3.

This statement is simply untrue. Since there is no breakdown between age groups in Dr. Young's study, the relevant national figure would be the percentage of deaths attributable to malignancies for all ages – 14.2% which is exceeded by the reported figure for "CF&I coke oven workers" – 14.3%. (R-159A at 3)[10]

In further support of his conclusion, Dr. Young compares, in his supplemental statement, the percentage of deaths attributable to malignancies in Pueblo, Colorado (13.4%) with the comparable figure for Pittsburg, Pennsylvania (19.1%). (R-159A at 6) Based upon this comparison, he reports "markedly lower percentage figures for deaths due to malignancies in the area of CF&I's plant." (R-159A at 6) On its face, this comparison would seem to support Dr. Young's ultimate conclusion. However, the absence of a hospital in the Pueblo area that specializes in malignancies could result in the percentage of deaths reported for Pueblo being understated. Furthermore, if this figure is statistically valid, then the percentage of deaths attributable to malignancies in the Pueblo area (13.3%) when compared to respondent's "coke oven workers" (14.3%) demonstrates an increased incidence of such malignancies among respondent's coke oven workers.

For the foregoing reasons, it is found that the studies relied upon by Dr. Young [are] either unreliable or do not support his conclusion. Therefore, no weight will be given to Dr. Young's conclusion.

Having rejected respondent's arguments concerning the characterization of the violation, it is found that the violation is serious.[11] Further, taking into consideration the gravity of the violation, as well as respondent's size, history of previous violations and good faith, it is found that the proposed penalty of $1,000.00 is appropriate.

[10] Dr. Young further states that he believes the percentage of deaths due to malignancies among respondent's employees is actually lower than the 14.3%. This belief is based upon interviews with friends and relatives of 14 of the 23 persons who died whom Dr. Young could not locate death certificates. In the absence of any evidence that such information has any statistical reliability, this statement by Dr. Young will be disregarded in its entirety.

Size alone warrants the imposition of the maximum penalty ($1,000.00) in this case. Given the magnitude of respondent's operations, as indicated by its expenditures for pollution control, (R-41) there is a serious question of whether even the maximum penalty will operate to deter respondent from violating the standard in the future. Certainly anything less than the maximum penalty could not be expected to accomplish such deterrent effect.

The gravity of the violation, to the extent it even be quantified, would appear to range from moderate to high. This circumstance coupled with respondent's previous history of violations also support the imposition of the maximum penalty.

Consideration of respondent's good faith presents a more complex issue. Based upon the evidence in this record, it appears that respondent has made a good faith effort to provide protection to its employees and the surrounding community by installing an extensive system of engineering controls. In contrast, the record shows that with respect to initiating and implementing work practices which would provide an additional and essential measure of protection for its employees, respondent has done little more (and sometimes less) than is required by law. Such a checkered pattern of action hardly presents a compelling argument for reducing the penalty particularly when the other factors of penalty assessment are also taken into consideration.

[11] Since the determination to limit the regulated area was a conscious decision of respondent's management, the requisite knowledge is evident in this case.

Citation No. 2, Item No. 1

The second charge is an alleged willful violation of 29 C.F.R. § 1910.1029(b)(3) which provides:

> *Respirator Program* The employer shall institute a respiratory protection program in accordance with § 1910.134 of this part.

The specific allegations, as set out in Citation No. 2, Item No. 1, and modified at the outset of the hearing are:

> 29 C.F.R. § 1910.1029(b)(3): The employer did not institute a respiratory program in accordance with 1910.134 of this part, in that; Respiratory Training did not provide the employees an opportunity to have their respirator fitted properly and test its face-piece-to-face-seal:
>
> (a) 28 Coke oven employees working in the regulated area exposed to Coke oven emissions failed their respirator fit test and were not provided with a different respirator which would fit.
>
> (b) 30 Coke oven employees working in the regulated area exposed to Coke oven emissions were not qualitatively fit-tested to determine if their respirators did fit. (Tr. 12)

The specific provision of the respiratory protection standard which is claimed to have been violated is set out as follows:

> For safe use of any respirator, it is essential that the user be properly instructed in its selection, use and maintenance. Both supervisors and workers shall be so instructed by competent persons. Training shall provide the men an opportunity to handle the respirator, *have it fitted properly*, test its face-piece-to-face-seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere. (emphasis added, 29 C.F.R. § 1910.134(e)(5)).

Two separate and distinct theories of violation are advanced in support of this willful charge. First, it is argued that the above-quoted respiratory protection standard requires respondent to provide qualitative fit testing of its employees in a test atmosphere prior to their initial assignment into regulated areas. Second, it is argued that such standard requires respondent to provide its employees with a different type or size respirator if they fail the qualitative fit test that is provided.

Respondent readily concedes that some of its employees were not qualitatively fit tested in a test atmosphere prior to their initial assignment in regulated areas. (Respondent's Brief at 21) However, respondent argues that it did provide positive/negative pressure tests to employees at the outset of their employment and that such tests meet[] the requirements of the standard.

It is not disputed that respondent instructed its employees at the outset of their training on how to conduct a positive/negative pressure test. Even though this test is a qualitative test, it does not meet the "test atmosphere" requirements of 29 C.F.R. § 1910.134(e)(5) (Tr. 462). Thus, the training required under the cited standard requires qualitative testing in a test atmosphere which requirement is not met by merely providing positive/negative pressure tests.

The remaining question requires a determination as to when the prescribed training is to be given. Complainant and the AER concede the absence of express provision within the standard as to the timing of the prescribed training. Nevertheless, they argue that because of the grave risk inherent in exposure to coke oven emissions, the standard should be interpreted as requiring the provision of the prescribed training prior to initial assignment into regulated areas.

This argument is rejected. While it would seem eminently reasonable to adopt such a timing requirement for this industry, the Secretary did not see fit to do so. Instead, he adopted the general standard which is silent as to when training is to be provided. Since this standard is intended to apply in a variety of circumstances and industries, including those where the use of respirators would be limited to emergency use, it is believed unreasonable to interpret that standard as imposing a special timing requirement as to a particular industry. For this reason, it is found that the failure of respondent to provide the prescribed training to its employees prior to their initial assignment into regulated areas does not constitute a violation of the cited standard.

The second theory of violation focuses upon the "properly fitted" requirement of 29 C.F.R. § 1910.134(e)(5) which is incorporated into the coke oven emission standard by virtue of 29 C.F.R. § 1910.1029(g)(3). The former standard specifies in pertinent part:

> "training shall provide the men an opportunity . . . to have [the respirator] fitted properly."

As previously described, respondent's respirator training program included two forms of respirator testing. First, the employees were instructed on how to conduct a positive/negative pressure test. At a later date, respondent's training provided an opportunity for the employees to have their respirators fitted in a test atmosphere. However, the proof shows that when respondent's employees failed the latter test, they were not so informed, but were instead returned to the workplace with the very same respirator that had been used when the employee failed the test. (Tr. 78,251, C-12)

Respondent's defense to this charge is that by giving its employees the positive/negative pressure test, they had

complied with the standard. Hence, the fact that they did not provide different respirators to those who failed the banana oil test is inconsequential. As previously indicated, this argument ignores the additional requirement contained in the standard which requires respondent's training program:

> ". . . shall provide . . . an opportunity . . . to wear [the respirator] in a test atmosphere."

The banana oil test is one of the two most common types of test agents (the other being irritant smoke) which meets the test atmosphere requirement. (Tr. 459) Thus, in administering the banana oil test to its employees, respondent was meeting, not exceeding, the requirements of the standard.

More importantly, this argument fails to address the central issue of whether respondent complied with the "properly fitted" requirement of the standard. The undisputed facts are that respondent administered two tests. The first was the positive/negative pressure test, which is an unreliable means of testing fitness, compared to the other test administered by respondent, the banana oil test. Since the standard also requires that the training be administered by "competent persons," respondent can be expected to have recognized that the results of the banana oil test [were] a more reliable indicia of fitness than the positive/negative pressure test. In this case, twenty-eight of respondent's employees failed the banana oil test which gave respondent every reason to believe that the respirators provided to such employees did not fit properly. (C-12) Since the evidence shows that such employees were not provided with respirators with a different size face piece, respondent has violated 29 C.F.R. § 1910.134(e)(5) as charged.

The remaining arguments presented by respondent in defense to this charge are also unpersuasive. Respondent

argues that zero face-piece leakage is impossible to achieve. (Respondent's Brief at 26) Further, it argues that the banana oil test is an unreliable indicia of fitness because it is possible to fail the test even if the respirator fits properly. (Respondent's Brief at 27) The simple answer to this first argument is that respondent is not charged with having failed to provide respirators with zero face-piece leakage. Complainant's expert, Mr. Pritchard, readily conceded that zero face-piece leakage is impossible to achieve. Given this circumstance, it is obvious that the test upon which a determination of fitness is based, allows for some leakage. Otherwise, no one would pass the test.

Turning now to the second argument, there are at least two tests that respondent could use which meets the test atmosphere of the standard – the banana oil test and the irritant smoke test. (Tr. 459) Respondent elected to use the test which is the most subjective; hence, the least reliable of these two tests. (Tr. 461) Now, respondent argues that because of the test it elected to give lacks certainty as to its results, improper fitness should not be presumed.

This argument is rejected. Respondent is bound by the results of the test it elected to administer since the results of that test are the best indicia of fitness available. If respondent was dissatisfied with the results of such test it could have elected to re-test with the same or a different test agent. Since these test results show that the employees were not properly fitted, respondent was obligated to provide a different respirator to those that failed the test. Having failed to meet this obligation, respondent has violated the standard as charged.

It is further found that this violation is willful even under the standard of willfulness advanced by respondent. Respondent relies upon the following as a test of determining willfulness:

> The failure to comply with a safety standard under the Occupational Safety and Health Act is willful if done knowingly and purposely by an employer, who having a free will or choice, either intentionally disregards the standard or is plainly indifferent to its requirement. An omission or failure to act is willfully done if done voluntarily and intentionally.

United States v. Dye Construction Company, 510 F.2d 78 (10th Cir. 1975).

The record in this case establishes that respondent exhibited an intentional disregard or a plain indifference to the standard. First of all, the requirements of the standard were explained to respondent long in advance of the inspection by the compliance officer. (Tr. 109, 113) Second, respondent's own training films make[] clear that respondent recognized its obligation to provide different respirators for those who failed the banana oil test. (Tr. 86) Given these circumstances there can be no question that respondent deliberately disregarded the requirements of the standard.

In determining the amount of penalty to be assessed for this willful violation, it is found that the maximum penalty of $10,000.00 proposed in the citation is appropriate. Here, respondent showed its employees a training film which explained the banana oil test that would be conducted. This film informed the employees that if they failed the test they would be provided with a different respirator. (Tr. 86) Contrary to this, respondent, in complete disregard to basic considerations of safety, did not inform those that failed the test of such event. (Tr. 78, 406) Instead, respondent returned them to the workplace with the very same respirator that had been determined by the test to improperly fit. (Tr. 78, 405) Thus, the employees, some of whom, worked in areas where the coke

oven emissions exceeded the permissible exposure limit (C-22) were misled by respondent into thinking the protection afforded was adequate, when, according to the best information available to respondent, it was not. Such cynical disregard for the safety of its workers and such a deliberate disregard for the standard itself makes even the maximum penalty seem pitifully inadequate.

Citation No. 3, Item No. 1

The three remaining charges involve alleged repeated violations. The first charge involves an alleged violation of 29 C.F.R. § 1910.1029(h)(1)(i) which provides:

> *Protective clothing and equipment*—(1) *Provision and use.* The employer shall provide and assure the use of appropriate protective clothing and equipment, such as but not limited to: (i) Flame resistant jacket and pants.

The specific allegation, as set forth in Citation No. 3, Item No. 1 is:

> 29 C.F.R. 1910.1029(h)(1)(i): The employer did not provide appropriate protective clothing to the following employees in the regulated area of the coke ovens in that, flame-resistant pants were not provided and used:
>
> (a) the bench helper on Battery B was not wearing flame-retardant pants, August 2, 1979;
>
> (b) the pipe fitter working on a push car, north of end D battery on August 2, 1979, was not w[e]aring flame-retardant pants.[12]

The evidence unequivocally establishes that both employees referred to in the citation worked in the regulated area on the day in question and both had not been provided flame-resistant pants. Thus, it is clear that respondent failed to comply with the standard. It is further clear that in regard to each of the two instances alleged, the failure to comply exposed the employee to a hazardous condition.

[12] A penalty of $1,400.00 is proposed.

In the first instance, the bench helper, Mr. Navara, was working in an area where he was not only exposed to coke oven emissions which could collect on his clothing, he was also exposed to extreme heat and flames em[a]nating from the coke ovens themselves. In the other instance, the pipe fitter, Mr. Franklin, was not exposed to the heat or flames but was exposed to the coke oven emissions which could collect on his clothing.

At the time of the inspection, Mr. Franklin was working at ground level on the push car, which was contaminated with coke oven emissions. Furthermore, that same day, Mr. Franklin's duties caused him to be on topside, an area which even respondent recognized as a regulated area.

Moreover, the evidence establishes that these were not isolated instances. Respondent had failed to provide protective clothing to its employees virtually the entire period the standard had been [in] effect. (Tr. 284-285, 293, 357-358, 410-411, 820-821) Furthermore, respondent's supervisory personnel did not require employees to obtain protective clothing before they worked in regulated areas. (Tr. 287, 412-413)

Respondent raises two arguments in defense to this charge. The first is:

> Contrary to the allegation . . . the standard does not specify that flame-retardant pants are required in the regulated area. (Respondent's brief at 38)

Respondent is correct in stating that the area in which flame-retardant (resistant) pants are required is not specified in the standard. However, the absence of such speci-

tivity does not constitute a defense. In the absence of language in the standard which would limit the areas in which such clothing is required, the prescribed clothing must be worn by all who come within the scope of the standard, to wit: "all coke oven workers." (Preamble, 41 Fed. Reg. at 46,775)[13] Thus, for those employees such as Mr. Franklin, whose duties may not have exposed them to flames and extreme heat but, who were exposed to coke oven emissions, respondent could have sought a variance which would have permitted it to provide pants other than flame-retardant pants. It may very well be that jeans would have been sufficient. Had respondent provided such alternative protective clothing, and had respondent provided for the cleaning and replacement of such clothing in accordance with 29 C.F.R. § 1910.1029(h)(2), a persuasive argument could have been made that the employees were not exposed to the hazard from which the provision was designed to protect. However, by failing to provide such alternative clothing the contaminated clothing worn by the employee was not cleaned and maintained in the prescribed manner. Instead, the contaminated jeans were taken to the employees home to be laundered which action resulted in exposing the employee and perhaps his family to coke oven emissions. (Tr. 287)

Respondent's second argument is that the prescribed protective clothing was available. (Respondent's brief at 38) This argument does not constitute a defense to the charge. Under the standard, respondent has an affirmative obligation to "provide and assure the use of" the prescribed protective clothing. The evidence unequivocally shows that respondent did not meet either of these obligations.

[13] Undoubtedly, the procedure contemplated by the Secretary for relieving the employer of this obligation in certain cases, is the variance procedure under 29 U.S.C. § 655(d).

The evidence relied upon in support of respondent's availability argument is the testimony of respondent's assistant superintendent who testified that after the inspection, he personally observed coveralls available for distribution in the supply room. (Tr. 754) Rather than constitute a defense to the charge, this evidence supports the conclusion that the prescribed protective clothing was withheld from the employees either deliberately or otherwise. For this reason, it is found that respondent violated 29 C.F.R. § 1910.1029(h)(1) as charged.

At the time of this violation, there was a Commission final order against respondent for a substantially similar violation. (C-6, Item No. 6, C-7 at p. 7, ¶ 12, AER Brief, Appendix A) Thus, this violation constitutes a repeated violation as contemplated by 29 U.S.C. § 666(a). *Potlatch Corp,* 79 OSAHRC 6/A2, 7 BNA OSHC 1061, 1979 CCH OSHD, ¶ 23,294 (No. 16183, 1979)

The gravity of this violation would appear to be high, particularly in the instance of failing to provide flame-resistant pants to the bench helper who was directly exposed to the flames and extreme heat generated by the coke ovens. Taking this circumstance into account as well as the other statutory considerations which have been previously described, the proposed penalty of $1,400.00 for this violation seems more than reasonable and fair to respondent.

Citation No. 3, Item No. 2

The next charge concerns alleged incidents of smoking within the regulated areas in violation of 29 C.F.R. § 1910.1029(i)(5)(i). This standard provides:

> The employer shall assure that in the regulated area . . . smoking products are not present or used . . .

The specific allegation, as set forth in Citation No. 3, Item No. 2 is:

29 C.F.R. § 1910.1029(L)(sic)(4)(i):

> The employer did not enforce or ensure that smoking products would not be present and/or consumed in the regulated area:
>
> (a) The plant safety supervisor was smoking a cigarette topside at the north end of the north coal bin and bench level at the south door repair facility, August 2, 1979.
>
> (b) The turn foreman was smoking a cigarette topside at the north end of the north coal bin, August 2, 1979.

There is no dispute concerning the facts. On the day of the inspection, two of respondent's employees were observed smoking. The plant's safety director was observed smoking in the south door repair facility and the north end of the north coal bin (Tr. 59 & 248), and the turn foreman was observed smoking at the north end of the north coal bin area. (Tr. 248) Since both of these areas are located where coke oven emissions would be expected to be present, the failure to prohibit smoking exposed the employees to the hazard of ingesting such emissions.

Respondent's defense to this charge is that the two areas were not required to be designated as regulated areas; hence, smoking was not prohibited under the standard. However, having previoasly found that these two areas are required to be established as regulated areas, this defense cannot prevail. Thus, respondent, is found to have violated 29 C.F.R. § 1910.1029(i)(5)(i) as charged.

There was a Commission final order against respondent for a substantially similar violation at the time of this violation as well. (C-6, Item No. 49, C-7, ¶ 12, p. 7, AER Brief, Appendix A) Therefore, this violation is also found to be repeated.

There is, in this instance, a mitigating factor which warrants a lesser penalty than the $2,000.00 penalty that is proposed. Here, the reason respondent has violated the smoking prohibition is because it failed to establish the coal bin areas as a part of the regulated area, as required by 29 C.F.R. § 1910.1029(d)(2)(i). Since the latter failure constitutes a separate violation for which the maximum penalty of $1,000.00 has already been assessed, there is an element of penalty duplication presented here. For this reason, it is found that a penalty of $200.00 is appropriate for this violation.

Citation No. 3, Item No. 3

The final charge alleges a repeated violation of 29 C.F.R. § 1910.1029(k)(1)(ii) which provides:

> The training program shall be provided as of January 27, 1977 for employees who are employed in the regulated area at that time or at the time of initial assignment to a regulated area.

The specific allegation, as set forth in Citation No. 3, Item No. 3 is:

> 29 C.F.R. § 1910.1029(k)(1)(ii): The employer did not institute an effective training program for Coke oven employees working in the regulated area or at the times of initial assignment to the regulated area, in that:
>
> a) New employees, with no prior work experience in the regulated area, did not recieve adequate on-the-job training on the proper work practices and written procedures to minimize Coke oven emissions prior to assignment in the regulated area.

b) New employees did not receive adequate instructions on respirator usage, fitting and limitations prior to assignment in the regulated areas.

c) Employees with experience in the regulated area, did not receive adequate instructions and on-the-job training in the proper work practices and written procedures to minimize Coke oven emissions prior to assignment in a new job position they had not worked before.

It appears that the proponents of this citation have abandoned the allegation contained in subpart (b). This subpart, which deals with respirator training for employees prior to assignment in the regulated area, is expressly abandoned by the authorized employee representative (AER Brief at 35, n. 26). Complainant, in failing to address this allegation in his brief, also appears to have abandoned it. In any event, an independent review of the evidence supports the conclusion that the evidence does not support the allegation.

It is further found that the allegations of violation set forth in subpart (c) do not constitute a violation of the cited standard. The cited standard requires training "at the time of *initial* assignment to a regulated area." (29 C.F.R. § 1910.1029(k)(1)(ii), emphasis added) The substantive charge contained in subpart (c) does not go to the failure to provide training prior to the "initial assignment" but rather the failure to provide training after the initial assignment to a regulated area.

Thus, the only allegation contained in this item which comes within the parameters of the standard is contained in subpart (a) which charges respondent with having failed to provide two forms of training – on-the-job training and written procedures. However, to the extent that respondent is charged with having violated the standard by failing

to give on-the-job training, it appears that this charge too must fail. The content of the training which respondent is required to provide to its employees is set forth in 29 C.F.R. § 1910.1029(k)(1)(iv). Nowhere within the five enumerated categories of information which is required to be contained within the content of the training program is there provision for on-the-job training. Thus, the failure to provide on-the-job training does not constitute a violation of the cited standard.

Nevertheless, one of the categories of information which is required to be provided to new employees prior to their initial assignment to the regulated area is the written procedures pertaining to work practices. 29 C.F.R. § 1910.1029(k)(1)(iv)(d) requires respondent to inform each employee of "a review of all written procedures and schedules required under [29 C.F.R. § 1910.1029(f)]." Included under this latter standard is the requirement that all the written procedures pertaining to work practices be incorporated into the training program. 29 C.F.R. § 1910.1029(f)(7). In this case, Ms. Reynolds, an employee of respondent, was not provided an opportunity to review the written procedures pertaining to the position of bench helper prior to her initial assignment to the regulated area. (Tr. 437-439, C-5 (a)-(d)) Thus, respondent failed to comply with the cited standard and at least one employee was exposed to the hazard presented by respondent's noncompliance.[14]

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[14] Due to the immediate proximity of the bench helper to the coke oven doors, the employee was clearly exposed to the hazard the training standard was designed to control, namely, coke oven emissions. The proponents of this citation focus on what would appear to be an even greater hazard, namely, severe burns which this employee experienced as a result of being assigned to a work station for which she was improperly trained. (Tr. 440) Inasmuch as the training standard does not appear to contemplate protection from the extreme heat and

As is the case in the two preceding violations, there was a Commission final order against respondent for a substantially similar violation at the time of this violation. (C-6, Item No. 44a, C-7, ¶ 12, AER Brief, Appendix A) Respondent was previously cited for failure to comply with the 29 C.F.R. § 1910.1029(f)(7). (C-6, Item 44a) This provision requires, in part, an employer to incorporate all the written procedures specified therein, into the training program prescribed by subpart (k) of the Coke Oven Emissions Standard. Since this is a duplication of the training provision contained in subpart (k) which prescribes the conveyance of information pertaining to such written procedures to employees, the violations are substantially similar. Thus, this violation is also a repeat violation within the intent and meaning of the Act.

Finally, taking into account the statutory considerations previously discussed, the proposed penalty of $2,000.00 is found to be appropriate for this violation.

ORDER

Based upon the foregoing, IT IS ORDERED that:

1. Citation No. 1, Item No. 1, is *AFFIRMED*, and a penalty of $1,000.00 is *ASSESSED*.

2. Citation No. 2, Item No. 1, is *AFFIRMED*, and a penalty of $10,000.00 is *ASSESSED*.

3. Citation No. 3, Item No. 1, is *AFFIRMED*, and a penalty of $1,400.00 is *ASSESSED*.

4. Citation No. 3, Item No. 2, is *AFFIRMED*, and a penalty of $200.00 is *ASSESSED*.

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flames generated by the ovens, evidence of burns is irrelevant to the issue presented here.

5. Citation No. 3, Item No. 3, is *AFFIRMED*, and a penalty of $2,000.00 is *ASSESSED*.

/s/ Quentin P. McColgin
QUENTIN P. McCOLGIN
Administrative Law Judge

Dated: August 27, 1981

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title 29 provides in pertinent part:

§ 651. Congressional statement of findings and declaration of purpose and policy

* * * * *

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

* * * * *

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this chapter;

§ 655. Standards

(a) Promulgation by Secretary of national consensus standards and established Federal standards; time for promulgation; conflicting standards

Without regard to chapter 5 of title 5 or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated em-

ployees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

(b) Procedure for promulgation, modification, or revocation of standards

The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this chapter, the Secretary may request the recommendations of an advisory committee appointed under section 656 of this title. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health and Human Services, together with all pertinent factual information developed by the Secretary or the Secretary of Health and Human Services, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

(3) On on [*sic*] before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing.

(4) Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and of its terms and that employers affected are given an opportunity to familiarize

themselves and their employees with the existence of the requirements of the standard.

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

(6)(A) Any employer may apply to the Secretary for a temporary order granting a variance from a standard or any provision thereof promulgated under this section. Such temporary order shall be granted only if the employer files an application which meets the requirements of clause (B) and establishes that (i) he is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date, (ii) he is taking all available steps to safeguard his employees against the hazards covered by the standard, and (iii) he has an effective program for coming into compliance with the standard as quickly as

practicable. Any temporary order issued under this paragraph shall prescribe the practices, means, methods, operations, and processes which the employer must adopt and use while the order is in effect and state in detail his program for coming into compliance with the standard. Such a temporary order may be granted only after notice to employees and an opportunity for a hearing: *Provided*, That the Secretary may issue one interim order to be effective until a decision is made on the basis of the hearing. No temporary order may be in effect for longer than the period needed by the employer to achieve compliance with the standard or one year, whichever is shorter, except that such an order may be renewed not more than twice (I) so long as the requirements of this paragraph are met and (II) if an application for renewal is filed at least 90 days prior to the expiration date of the order. No interim renewal of an order may remain in effect for longer than 180 days.

(B) An application for a temporary order under this paragraph (6) shall contain:

(i) a specification of the standard or portion thereof from which the employer seeks a variance,

(ii) a representation by the employer, supported by representations from qualified persons having firsthand knowledge of the facts represented, that he is unable to comply with the standard or portion thereof and a detailed statement of the reasons therefor,

(iii) a statement of the steps he has taken and will take (with specific dates) to protect employees against the hazard covered by the standard,

(iv) a statement of when he expects to be able to comply with the standard and what steps he has taken and what steps he will take (with dates specified) to come into compliance with the standard, and

(v) a certification that he has informed his employees of the application by giving a copy thereof to their authorized representative, posting a statement giving a summary of the application and specifying where a copy may be examined at the place or places where notices to employees are normally posted, and by other appropriate means.

A description of how employees have been informed shall be contained in the certification. The information to employees shall also inform them of their right to petition the Secretary for a hearing.

(C) The Secretary is authorized to grant a variance from any standard or portion thereof whenever he determines, or the Secretary of Health and Human Services certifies, that such variance is necessary to permit an employer to participate in an experiment approved by him or the Secretary of Health and Human Services designed to demonstrate or validate new and improved techniques to safeguard the health or safety of workers.

(7) Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure. Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards

in order to most effectively determine whether the health of such employees is adversely affected by such exposure. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health and Human Services, such examinations may be furnished at the expense of the Secretary of Health and Human Services. The results of such examinations or tests shall be furnished only to the Secretary or the Secretary of Health and Human Services, and, at the request of the employee, to his physician. The Secretary, in consultation with the Secretary of Health and Human Services, may by rule promulgated pursuant to section 553 of title 5, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

(8) Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this chapter than the national consensus standard.

(c) Emergency temporary standards

(1) The Secretary shall provide, without regard to the requirements of chapter 5 of title 5, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

(2) Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

(3) Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with subsection (b) of this section, and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection.

(d) Variances from standards; procedure

Any affected employer may apply to the Secretary for a rule or order for a variance from a standard promulgated under this section. Affected employees shall be given notice of each such application and an opportunity to participate in a hearing. The Secretary shall issue such rule or order if he determines on the record, after opportunity for an inspection where appropriate and a hearing, that the proponent of the variance has demonstrated by a preponderance of the evidence that the conditions, practices, means, methods, operations, or processes used or proposed to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard. The rule or order so issued shall prescribe the conditions the employer must maintain, and the practices, means, methods, operations, and processes which he must adopt and utilize to the extent they differ from the standard in question. Such a rule or order may be modified or revoked upon application by an employer, employees, or by the Secretary on his own motion, in the manner prescribed for its issuance under this subsection at any time after six months from its issuance.

(e) Statement of reasons for Secretary's determinations; publication in Federal Register

Whenever the Secretary promulgates any standard, makes any rule, order, or decision, grants any exemption or extension of time, or compromises, mitigates, or settles any penalty assessed under this chapter, he shall include a statement of the reasons for such action, which shall be published in the Federal Register.

(f) Judicial Review

Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

(g) Priority for establishment of standards

In determining the priority for establishing standards under this section, the Secretary shall give due regard to the urgency of the need for mandatory safety and health standards for particular industries, trades, crafts, occupations, businesses, workplaces or work environments. The Secretary shall also give due regard to the recommendations of the Secretary of Health and Human Services regarding the need for mandatory standards in determining the priority for establishing such standards.

§ 658. Citations

(a) Authority to issue; grounds; contents; notice in lieu of citation for de minimis violations

If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 654 of this title, of any standard, rule or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.

(b) Posting

Each citation issued under this section, or a copy or copies thereof, shall be prominently posted, as prescribed in regulations issued by the Secretary, at or near each place a violation referred to in the citation occurred.

(c) Time for issuance

No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

§ 659. Enforcement procedures

(a) Notification of employer of proposed assessment of penalty subsequent to issuance of citation; time for notification of Secretary by employer of contest by employer of citation or proposed assessment; citation and proposed assessment as final order upon failure of employer to notify of contest and failure of employees to file notice

If, after an inspection or investigation, the Secretary issues a citation under section 658(a) of this title, he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 666 of this title and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) of this section within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(b) Notification of employer of failure to correct in alloted time period violation for which citation was issued and proposed assessment of penalty for failure to correct; time for notification of Secretary by employer of contest by employer of notification of failure to correct or proposed assessment; notification or proposed assessment as final order upon failure of employer to notify of contest

If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a

final order by the Commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties), the Secretary shall notify the employer by certified mail of such failure and of the penalty proposed to be assessed under section 666 of this title by reason of such failure, and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the Secretary's notification or the proposed assessment of penalty. If, within fifteen working days from the receipt of notification issued by the Secretary, the employer fails to notify the Secretary that he intends to contest the notification or proposed assessment of penalty, the notification or proposed assessment of penalty, the notification and assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

(c) Advisement of Commission by Secretary of notification of contest by employer of citation or notification or of filing of notice by any employee or representative of employees; hearing by Commission; orders of Commission and Secretary; rules of procedure

If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5 but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order,

based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

§ 660. (1982 & Supp. V 1987) Judicial review

(a) Filing of petition by persons adversely affected or aggrieved; orders subject to review; jurisdiction; venue; procedure; conclusiveness of record and findings of Commission; appropriate relief; finality of judgment

Any person adversely affected or aggrieved by an order of the Commission issued under subsection (c) of section 659 of this title may obtain a review of such order in any United States court of appeals for the circuit in which the violation is alleged to have occurred or where the employer has its principal office, or in the Court of Appeals for the District of Columbia Circuit, by filing in such court within sixty days following the issuance of such order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission and to the other parties, and thereupon the Commission shall file in the court the record in the proceeding as provided in section 2112 of title 28. Upon such filing, the court shall have jurisdiction

of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, or setting aside in whole or in part, the order of the Commission and enforcing the same to the extent that such order is affirmed or modified. The commencement of proceedings under this subsection shall not, unless ordered by the court, operate as a stay of the order of the Commission. No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Commission with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of title 28.

(b) Filing of petition by Secretary; orders subject to review; jurisdiction; venue; procedure; conclusiveness of record and findings of Commission; enforcement of orders; contempt proceedings

The Secretary may also obtain review or enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals for the circuit in which the alleged violation occurred or in which the employer has its principal office, and the provisions of subsection (a) of this section shall govern such proceedings to the extent applicable. If no petition for review, as provided in subsection (a) of this section, is filed within sixty days after service of the Commission's order, the Commission's findings of fact and order shall be conclusive in connection with any petition for enforcement which is filed by the Secretary after the expiration of such sixty-day period. In any such case, as well as in the case of a noncontested citation or notification by the Secretary which has become a final order of the Commission under subsection (a) or (b) of section 659 of this title, the clerk of the court, unless otherwise ordered by the court, shall forthwith enter a decree enforcing the order and shall transmit a copy of such decree to the Secretary and the employer named in the petition. In any contempt proceeding brought to enforce a decree of a court of appeals entered pursuant to this subsection or subsection (a) of this section, the court of appeals may assess the penalties provided in section 666 of this title, in addition to invoking any other available remedies.

(c) Discharge or discrimination against employee for exercise of rights under this chapter; prohibition; procedure for relief

(1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or

has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter.

(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall cause such investigation to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph (2) of this subsection.

§ 661. Occupational Safety and Health Review Commission

(a) Establishment; membership; appointment; Chairman

The Occupational Safety and Health Review Commission is hereby established. The Commission shall be composed of three members who shall be appointed by the President, by and with the advice and consent of the Senate, from among persons who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this chapter. The President shall designate one of the members of the Commission to serve as Chairman.

(b) Terms of office; removal by President

The terms of members of the Commission shall be six years except that (1) the members of the Commission first taking office shall serve, as designated by the President at the time of appointment, one for a term of two years, one for a term of four years, and one for a term of six years, and (2) a vacancy caused by the death, resignation, or removal of a member prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term. A member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

* * * * *

(d) Principal office; hearings or other proceedings at other places

The principal office of the Commission shall be in the District of Columbia. Whenever the Commission deems that the convenience of the public or of the parties may be promoted, or delay or expense may be minimized, it may hold hearings or conduct other proceedings at any other place.

(e) Functions and duties of Chairman; appointment and compensation of administrative law judges and other employees

The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission and shall appoint such administrative law judges and other employees as he deems necessary to assist in the performance of the Commission's functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5 relating to classification and General Schedule pay rates: *Provided*, That assignment, removal and compensation

of administrative law judges shall be in accordance with sections 3105, 3344, 5372, and 7521 of title 5.

(f) Quorum; official action

For the purpose of carrying out its functions under this chapter, two members of the Commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

(g) Hearings and records open to public; promulgation of rules; applicability of Federal Rules of Civil Procedure

Every official act of the Commission shall be entered of record, and its hearings and records shall be open to the public. The Commission is authorized to make such rules as are necessary for the orderly transaction of its proceedings. Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure.

(h) Depositions and production of documentary evidence; fees

The Commission may order testimony to be taken by deposition in any proceeding pending before it at any state of such proceeding. Any person may be compelled to appear and depose, and to produce books, papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission. Witnesses whose depositions are taken under this subsection, and the persons taking such depositions, shall be entitled to the same fees as are paid for like services in the courts of the United States.

(i) Investigatory powers

For the purpose of any proceedings before the Commission, the provisions of section 161 of this title are hereby

made applicable to the jurisdiction and powers of the Commission.

(j) Administrative law judges; determinations; report as final order of Commission

A[1] administrative law judge appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such administrative law judge by the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the administrative law judge shall become the final order of the Commission within thirty days after such report by the administrative law judge, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

(k) Appointment and compensation of administrative law judges

Except as otherwise provided in this chapter, the administrative law judges shall be subject to the laws governing employees in the classified civil service, except that appointments shall be made without regard to section 5108 of title 5. Each administrative law judge shall receive compensation at a rate not less than that prescribed for GS-16 under section 5332 of title 5.

[1] So in original. Probably should be "An".

29 C.F.R. 1910.134 provides:

Respiratory protection.

(a) *Permissible practice.* (1) In the control of those occupational diseases caused by breathing air contaminated with harmful dusts, fogs, fumes, mists, gases, smokes, sprays or vapors, the primary objective shall be to prevent atmospheric contamination. This shall be accomplished as far as feasible by accepted engineering control measures (for example, enclosure or confinement of the operation, general and local ventilation, and substitutition of less toxic materials). When effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used pursuant to the following requirement

(2) Respirators shall be provided by the employer when such equipment is necessary to protect the health of the employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protective program which shall include the requirements outlined in paragraph (b) of this section.

(3) The employee shall use the provided respiratory protection in accordance with instructions and training received.

(b) *Requirements for a minimal acceptable program.* (1) Written standard operating procedures governing the selection and use of respirators shall be established.

(2) Respirators shall be selected on the basis of hazards to which the worker is exposed.

(3) The user shall be instructed and trained in the proper use of respirators and their limitations.

(4) [Reserved]

(5) Respirators shall be regularly cleaned and disinfected. Those used by more than one worker shall be thoroughly cleaned and disinfected after each use.

(6) Respirators shall be stored in a convenient, clean, and sanitary location.

(7) Respirators used routinely shall be inspected during cleaning. Worn or deteriorated parts shall be replaced. Respirators for emergency use such as self-contained devices shall be thoroughly inspected at least once a month and after each use.

(8) Appropriate surveillance of work area conditions and degree of employee exposure or stress shall be maintained.

(9) There shall be regular inspection and evaluation to determine the continued effectiveness of the program.

(10) Persons should not be assigned to tasks requiring use of respirators unless it has been determined that they are physically able to perform the work and use the equipment. The local physician shall determine what health and physical conditions are pertinent. The respirator user's medical status should be reviewed periodically (for instance, annually).

(11) Approved or accepted respirators shall be used when they are available. The respirator furnished shall provide adequate respiratory protection against the particular hazard for which it is designed in accordance with standards established by competent authorities. The U.S. Department of Interior, Bureau of Mines, and the U.S. Department of Agriculture are recognized as such authorities. Although respirators listed by the U.S. Department of Agriculture continue to be acceptable for protection against specified pesticides, the U.S. Department of the Interior, Bureau of Mines, is the agency now responsible for testing and approving pesticide respirators.

(c) *Selection of respirators.* Proper selection of respirators shall be made according to the guidance of American National Standard Practices for Respiratory Protection Z88.2-1969.

(d) *Air quality.* (1) Compressed air, compressed oxygen, liquid air, and liquid oxygen used for respiration shall be of high purity. Oxygen shall meet the requirements of the United States Pharmacopoeia for medical or breathing oxygen. Breathing air shall meet at least the requirements of the specification for Grade D breathing air as described in Compressed Gas Association Commodity Specification G-7.1-1966. Compressed oxygen shall not be used in supplied-air respirators or in open circuit self-contained breathing apparatus that have previously used compressed air. Oxygen must never be used with air line respirators.

(2) Breathing air may be supplied to respirators from cylinders or air compressors.

(i) Cylinders shall be tested and maintained as prescribed in the Shipping Container Specification Regulations of the Department of Transportation (49 CFR Part 178).

(ii) The compressor for supplying air shall be equipped with necessary safety and standby devices. A breathing air-type compressor shall be used. Compressors shall be constructed and situated so as to avoid entry of contaminated air into the system and suitable in-line air purifying sorbent beds and filters installed to further assure breathing air quality. A receiver of sufficient capacity to enable the respirator wearer to escape from a contaminated atmosphere in event of compressor failure, and alarms to indicate compressor failure and overheating shall be installed in the system. If an oil-lubricated compressor is used, it shall have a high-temperature or carbon monoxide alarm, or both. If only a high-temperature alarm is used, the air from the compressor shall be frequently tested for carbon monoxide to insure that it meets the specifications in paragraph (d)(1) of this section.

(3) Air line couplings shall be incompatible with outlets for other gas systems to prevent inadvertent servicing of air line respirators with nonrespirable gases or oxygen.

(4) Breathing gas containers shall be marked in accordance with American National Standard Method of Marking Portable Compressed Gas Containers to Identify the Material Contained. Z48.1-1954; Federal Specification BB-A-1034a, June 21, 1968, Air, Compressed for Breathing Purposes; or Interim Federal Specification GG-B-00675b, April 27, 1965. Breathing Apparatus, Self-Contained.

(e) *Use of respirators.* (1) Standard procedures shall be developed for respirator use. These should include all information and guidance necessary for their proper selection, use, and care. Possible emergency and routine uses of respirators should be anticipated and planned for.

(2) The correct respirator shall be specified for each job. The respirator type is usually specified in the work procedures by a qualified individual supervising the respiratory protective program. The individual issuing them shall be adequately instructed to insure that the correct respirator is issued.

(3) Written procedures shall be prepared covering safe use of respirators in dangerous atmospheres that might be encountered in normal operations or in emergencies. Personnel shall be familiar with these procedures and the available respirators.

(i) In areas where the wearer, with failure of the respirator, could be overcome by a toxic or oxygen-deficient atmosphere, at least one additional man shall be present. Communications (visual, voice, or signal line) shall be maintained between both or all individuals present. Planning shall be such that one individual will be unaffected by any likely incident and have the proper rescue equipment to be able to assist the other(s) in case of emergency.

(ii) When self-contained breathing apparatus or hose masks with blowers are used in atmospheres immediately dangerous to life or health, standby men must be present with suitable rescue equipment.

(iii) Persons using air line respirators in atmospheres immediately hazardous to life or health shall be equipped with safety harnesses and safety lines for lifting or removing persons from hazardous atmospheres or other and equivalent provisions for the rescue of persons from hazardous atmospheres shall be used. A standby man or men with suitable self-contained breathing apparatus shall be at the nearest fresh air base for emergency rescue.

(4) Respiratory protection is no better than the respirator in use, even though it is worn conscientiously. Frequent random inspections shall be conducted by a qualified individual to assure that respirators are properly selected, used, cleaned, and maintained.

(5) For safe use of any respirator, it is essential that the user be properly instructed in its selection, use, and maintenance. Both supervisors and workers shall be so instructed by competent persons. Training shall provide the men an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere.

(i) Every respirator wearer shall receive fitting instructions including demonstrations and practice in how the respirator should be worn, how to adjust it, and how to determine if it fits properly. Respirators shall not be worn when conditions prevent a good face seal. Such conditions may be a growth of beard, sideburns, a skull cap that projects under the facepiece, or temple pieces on glasses. Also, the absence of one or both dentures can seriously affect the fit of a facepiece. The worker's diligence in observing these factors shall be evaluated by periodic check. To assure proper protection, the facepiece fit shall be checked by the wearer each time he puts on the respirator. This may be done by following the manufacturer's facepiece fitting instructions.

(ii) Providing respiratory protection for individuals wearing corrective glasses is a serious problem. A proper seal cannot be established if the temple bars of eye glasses extend through the sealing edge of the full facepiece. As a temporary measure, glasses with short temple bars or without temple bars may be taped to the wearer's head. Wearing of contact lenses in contaminated atmospheres with a respirator shall not be allowed. Systems have been developed for mounting corrective lenses inside full facepieces. When a workman must wear corrective lenses as part of the facepiece, the facepiece and lenses shall be fitted by qualified individuals to provide good vision, comfort, and a gas-tight seal.

(iii) If corrective spectacles or goggles are required, they shall be worn so as not to affect the fit of the facepiece. Proper selection of equipment will minimize or avoid this problem.

(f) *Maintenance and care of respirators.* (1) A program for maintenance and care of respirators shall be adjusted to the type of plant, working conditions, and hazards involved, and shall include the following basic services:

(i) Inspection for defects (including a leak check),

(ii) Cleaning and disinfecting,

(iii) Repair,

(iv) Storage

Equipment shall be properly maintained to retain its original effectiveness.

(2)(i) All respirators shall be inspected routinely before and after each use. A respirator that is not routinely used but is kept ready for emergency use shall be inspected after each use and at least monthly to assure that it is in satisfactory working condition.

(ii) Self-contained breathing apparatus shall be inspected monthly. Air and oxygen cylinders shall be fully charged according to the manufacturer's instructions. It

shall be determined that the regulator and warning devices function properly.

(iii) Respirator inspection shall include a check of the tightness of connections and the condition of the facepiece, headbands, valves, connecting tube, and cannisters. Rubber or elastomer parts shall be inspected for pliability and signs of deterioration. Stretching and manipulating rubber or elastomer parts with a massaging action will keep them pliable and flexible and prevent them from taking a set during storage.

(iv) A record shall be kept of inspection dates and findings for respirators maintained for emergency use.

(3) Routinely used respirators shall be collected, cleaned, and disinfected as frequently as necessary to insure that proper protection is provided for the wearer. Respirators maintained for emergency use shall be cleaned and disinfected after each use.

(4) Replacement or repairs shall be done only by experienced persons with parts designed for the respirator. No attempt shall be made to replace components or to make adjustments or repairs beyond the manufacturer's recommendations. Reducing or admission valves or regulators shall be returned to the manufacturer or to a trained technician for adjustment or repair.

(5)(i) After inspection, cleaning, and necessary repair, respirators shall be stored to protect against dust, sunlight, heat, extreme cold, excessive moisture, or damaging chemicals. Respirators placed at stations and work areas for emergency use should be quickly accessible at all times and should be stored in compartments built for the purpose. The compartments should be clearly marked. Routinely used respirators, such as dust respirators, may be placed in plastic bags. Respirators should not be stored in such places as lockers or tool boxes unless they are in carrying cases or cartons.

(ii) Respirators should be packed or stored so that the facepiece and exhalation valve will rest in a normal position and function will not be impaired by the elastomer setting in an abnormal position.

(iii) Instructions for proper storage of emergency respirators, such as gas masks and self-contained breathing apparatus, are found in "use and care" instructions usually mounted inside the carrying case lid.

(g) *Identification of gas mask canisters.* (1) The primary means of identifying a gas mask canister shall be by means of properly worded labels. The secondary means of identifying a gas mask canister shall be by a color code.

(2) All who issue or use gas masks falling within the scope of this section shall see that all gas mask canisters purchased or used by them are properly labeled and colored in accordance with these requirements before they are placed in service and that the labels and colors are properly maintained at all times thereafter until the canisters have completely served their purpose.

(3) On each canister shall appear in bold letters the following:

(i)—

Canister for _____

(Name for atmospheric contaminant)

or

Type N Gas Mask Canister-

(ii) In addition, essentially the following wording shall appear beneath the appropriate phrase on the canister label: "For respiratory protection in atmospheres containing not more than _____ percent by volume of _____."

(Name of atmospheric contaminant)

(4) Canisters having a special high-efficiency filter for protection against radionuclides and other highly toxic particulates shall be labeled with a statement of the type

and degree of protection afforded by the filter. The label shall be affixed to the neck end of, or to the gray stripe which is around and near the top of, the canister. The degree of protection shall be marked at the percent of penetration of the canister by a 0.3-micron-diameter dioctyl phthalate (DOP) smoke at a flow rate of 85 liters per minute.

(5) Each canister shall have a label warning that gas masks should be used only in atmospheres containing sufficient oxygen to support life (at least 16 percent by volume), since gas mask canisters are only designed to neutralize or remove contaminants from the air.

(6) Each gas mask canister shall be painted a distinctive color or combination of colors indicated in Table I-1. All colors used shall be such that they are clearly identifiable by the user and clearly distinguishable from one another. The color coating used shall offer a high degree of resistance to chipping, scaling, peeling, blistering, fading, and the effects of the ordinary atmospheres to which they may be exposed under normal conditions of storage and use. Appropriately colored pressure sensitive tape may be used for the stripes.

29 C.F.R. 1910.1029 provides:

Coke oven emissions.

* * * * *

(g) *Respiratory protection*—(1) *General.* (i) Where respiratory protection is required under this section, the employer shall provide and assure the use of respirators which comply with the requirements of this paragraph (g). Compliance with the permissible exposure limit may not be achieved by the use of respirators except:

(*a*) During the time period necessary to install or implement feasible engineering and work practice controls; or

(*b*) In work operations such as maintenance and repair activity in which engineering and work practice controls are technologically not feasible; or

(*c*) In work situations where feasible engineering and work practice controls are not yet sufficient to reduce exposure to or below the permissible exposure limit; or

(*d*) *In emergences.*

(ii) Notwithstanding any other requirement of this section, until January 20, 1978, the wearing of respirators shall be at the discretion of each employee where the employee is not in the vicinity of visible emissions.

(2) *Selection.* (i) Where respirators are required under this section, the employer shall select, provide and assure the use of the appropriate respirator or combination of respirators from Table I below.[*]

(ii) Not later than January 20, 1978, whenever respirators are required by this section for concentrations not greater than 1500 ug/m^3, the employer shall provide, at the option of each affected employee, either a particulate filter respirator as provided in paragraph (g)(2)(ii)(*b*) of

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* [Table I is moved to the end of 29 C.F.R. 1910.1029(g).]

this section, or a powered air-purifying respirator as provided in paragraph (g)(2)(i)(*a*) of this section.

(iii) The employer shall select respirators from among those approved for protection against dust and mist by the National Institute for Occupational Safety and Health (NIOSH) under the provisions of 30 CFR Part 11, except that not later than January 20, 1979, the employer shall select respirators from among those approved by NIOSH for protection against coke oven emissions.

(3) *Respirator program.* The employer shall institute a respiratory protection program in accordance with § 1910.134 of this part.

(4) *Respirator usage.* (i) The employer shall assure that the respirator issued to the employee exhibits minimum facepiece leakage and that the respirator is fitted properly.

(ii) The employer shall allow each employee who uses a filter respirator to change the filter elements whenever an increase in breathing resistance is detected and shall maintain an adequate supply of filter elements for this purpose.

(iii) The employer shall allow employees who wear respirators to wash their face and respirator facepiece to prevent skin irritation associated with respirator use.

TABLE I – RESPIRATORY PROTECTION FOR COKE OVEN EMISSIONS

Airborne concentration of coke oven emissions	Required respirator
(*a*) Any concentration . .	(*1*) A Type C supplied air respirator operated in pressure demand or other positive pressure or continuous flow mode; or (*2*) A powered air-purifying particulate filter respirator for dust and mist or (*3*) A powered air-purifying particulate filter respirator or combination chemical cartridge and particulate filter respirator for coke oven emissions.
(*b*) Concentrations not greater than 1500 ug/m^3.	(*1*) Any particulate filter respirator for dust and mist except single-use respirator; or (*2*) Any particulate filter respirator or combination chemical cartridge and particulate filter respirator for coke oven emissions; or (*3*) Any respirator listed in paragraph (g)(2)(i)(*a*) of this section.

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